IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

EX PARTE THE SUN PRINTING AND PUBLISHING ASSOCIATION,

Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI.

The facts of the case are stated in the petition. Here it is only necessary to dwell upon such of these facts, together with the proceedings in the Courts below, as have a bearing upon the question of the issue of the writ.

The granting of the application for a writ of *certiorari* being entirely within the discretion of the Court no fixed rules can be stated to determine its decision; but from the cases may be gathered suggestions that the power to bring up a record for review in the Supreme Court might well be exercised in cases where a divergence of opinion might occur in some of the nine appellate tribunals of equal rank created by the Act of March 3, 1891.

The necessity of avoiding conflict between courts of appeal and the courts of a State has also been referred to as an important consideration (*Forsyth* v. *Hammond*, 166 U. S., 506). In that case a conflict between the decision of the Circuit Court of Appeals

for the Seventh Circuit and the Supreme Court of the State of Indiana was one of the grounds for the issue of the writ.

The importance of the question involved is also suggested as one of the guiding considerations in this case, and the fact that the decision reached by the appellate court has involved a reversal of the court below is another circumstance to which attention is directed (*American Construction Co.* v. *Jacksonville R. R.*, 148 U. S., 372, citing the case of *Fabre, Petitioner*, No. 1237). This last was an admiralty case which presented an important question as to the rules of navigation.

It may, therefore, be said that while no general rule limits the discretion of the Court in this matter, yet the decision would be largely influenced towards granting the writ where the question of law presented was of great importance, where a difference of opinion between Circuit Courts of Appeal was involved, or a difference of opinion between a Circuit Court of Appeal and a State court, or where a division of opinion between the Judges below was indicated by a reversal or a modification of the judgment in the trial court.

All these considerations are present in the case at bar. We submit that upon the important principles governing the question whether a sum stipulated in a contract as liquidated damages shall be so regarded, or whether it shall be treated as a mere penalty, there is a variance between the decision of the Circuit Court of Appeals for the Second Circuit in the present case, and at least one other decision of the Circuit Court of Appeals for the Fourth Circuit (*Gay Mfg. Co.* v. *Camp*, 13 C. C. A., 137), and also a variance between the first mentioned court and the Court of Appeals of the State of New York; that the question is one of great gravity and importance as a question of law, as well as involving a very large sum—between forty and fifty thousand dollars—in the present case; that by reason of this fact, the judgment is one of extraordinary harshness and great

injustice; that a grave error was committed by the Court below in refusing to consider evidence as to the actual loss sustained by the libellant and in measuring the damages solely by the sum named in the alleged contracts of the parties; that the sum so named must be regarded solely as a penalty and as the maximum limit of liability of the respondent; and that the Circuit Court of Appeals further erred in modifying the judgment rendered in the District Court so as to increase the liability. The other grounds are fully stated in the course of this brief.

The agreements upon which the recovery is based consisted of an alleged charter-party and a so-called contract of suretyship. The alleged charter-party, printed as *Libellant's Exhibit 4*, is as follows:

"MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore of the City of New York, by Thomas Manning his Agent, party of the first part, hereinafter called the Owner, and Chester S. Lord of the City of New York, party of the second part, hereinafter called the Hirer.

WITNESSETH:

That the said William L. Moore being the owner of the steam yacht *Kanapaha* enrolled in the Atlantic Yacht Club, agrees to let and hereby does let, and the Hirer agrees to hire and hereby does hire, the said yacht as she is now for the term of four months from the first day of June expiring on the first day of October now next ensuing for the sum of Ten Thousand Dollars ($10,000.00) payable on the signing of this agreement.

That the Hirer will carry out the provisions of the charter-party made on the first day of April last and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses including amongst other things, uniforms, wages, provisions, pilotage, tonnage, light house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract, to the owner or his agent, at Manning's

Basin, foot of Twenty-sixth street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigation of the same do anything in contravention of the laws of the United States or of any foreign country.

That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of Seventy-five thousand dollars ($75,000) and the said hirer shall procure security or guarantee to and for the owner in the sum of Seventy-five thousand dollars ($75,000) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms and conditions of this contract.

That in the event of the failure of the Hirer to return and surrender the said yacht to the Owner as hereinbefore provided, the Hirer shall be charged demurrage and shall pay demurrage to the Owner at the rate of Five Hundred Dollars ($500.00) per day for each and every day's detention.

The Hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

That the Hirer during the continuance of this agreement shall at all times and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

THOMAS MANNING,
CHESTER S. LORD,
For the Sun Printing and Publishing Association."

Transcript of Record, pp. 334–335; fols. 1333–1339.

The so-called agreement of suretyship (*Libellant's Exhibit* 5), executed by Mr. Lord at the same time, is as follows:

WHEREAS BY AGREEMENT or charter-party dated May 14th, 1898, William L. Moore, of the City of New York, hereinafter called the Owner, did or is about to hire or charter unto Chester S. Lord of the City of New York, hereinafter called the Hirer, the steam yacht *Kanapaha*, enrolled in the Atlantic Yacht Club as will more fully and at large appear by a copy of said agreement or charter-party hereunto annexed and hereby made part hereof.

NOW AT THE REQUEST of the said Hirer and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged.

WE, The Sun Printing and Publishing Company, of the City of New York, for ourselves and each of us, our successor or sucessors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship.

FIRST, that the said Hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

SECOND, That we expressly waive and dispense with notice of any demand, suit or action at law against the Hirer and expressly waive any and all notice of non-performance of the terms of said annexed agreement on the part of the Hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

THIRD, That our liability hereunto shall in no case exceed the sum of Seventy-five Thousand Dollars ($75,000).

In witness whereof we have hereunto set our hands this 14th day of May, 1898.

CHESTER S. LORD,
For Sun Printing and Publishing Association.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known and known to me to be the Managing Editor of The Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed.

A. H. BRADLEY,
[SEAL.] Notary Public,
New York.

Transcript of Record, pp. 335-336; fols. 1340-1344.

It will be observed that the above agreements are inartificially drawn; that their provisions are in some respects obscure, and in others contradictory; that while it was apparently contemplated in the alleged charter-party that the so-called agreement of suretyship or guarantee should be executed by a party other than the party to the first agreement, it was in fact executed by the same individual, under the same designation; and they must, as the trial Court stated, be read together, so far as they can be.

Under these circumstances, and especially in view of the laxity in the construction of the agreements, the principle that courts of law must apply in construing a stipulation for liquidated damages as a penalty finds an additional justification.

Assuming that these instruments create any liability in this respondent, it is a liability upon a *quasi* agreement of indemnity, for actual loss and damage which may be sustained by the owner by reason of loss or damage to the boat and its belongings, and by reason of the breach of any of the terms of the contract. In such a case the sum named in the bond is regarded simply as a penalty, to which the total liability, ascertained from evidence of actual loss, is restricted.

An attempt is made in the contract to prescribe or liquidate the damages for the loss of the boat. The phrase "liquidated damages" is not used, but the

purport of the clause in regard to "the value of the yacht" is *merely a disguised stipulation for liquidated damages.* It was contended by the libellant that this was a valued policy of insurance; but this contention was itself rejected by Judge Brown at the trial, who said (*Transcript of Record*, p. 357, fol. 1428):

> "The valuation clause in marine policies of insurance is not analogous, I think, to this charter. In such policies that clause has reference to a single object, namely, the rights of the parties upon a loss by sea peril. In this charter its object was to determine also the amount of security, which was designed to cover and does cover a multitude of particulars, as well as the important obligation to pay the charter hire."

The trial Judge is evidently correct in this statement. This is not a valued policy of marine insurance. It is really an agreement of indemnity to secure the performance of certain covenants, limited in amount to $75,000, and the attempt has been made to state that this sum shall be the liquidated damages in case of failure to redeliver.

The opinion of Judge Wallace takes substantially the same view of this clause. He says (p. 7):

> "We think it was the meaning of the provision fixing the value of the yacht to fix it for the purpose of determining her value in case of her injury or destruction as the basis of damages, etc."

In other words, it is merely an ordinary provision for liquidated damages, in case of injury or destruction.

The alleged charter-party provides that the hirer shall procure security in the sum of $75,000, against what?

FIRST.—To secure any and all losses and damages which may occur to said boat or its belongings which may occur to said boat

(*a.*) by reason of such loss or damage, and

(*b.*) by reason of the breach of any of the terms or conditions of this contract.

This language certainly describes an ordinary agreement of suretyship with the sum of $75,000 as the penalty. The language could hardly be more explicit in confining the liability to actual loss and damage. It is to secure "any and all losses and damages *which may occur* to said boat," that is to say, actual losses and damages. It is "to secure any and all losses and damages which may be sustained by the owner by reason of such loss or damage." Here, again, it is actual loss and damage that is referred to.

Again, when reference is made to a breach of the terms and conditions of the contract, what is the bond to secure? It is to secure "any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner * * * by reason of the breach of any of the terms or conditions of this contract." In this case also, where the loss or damage arises from breach of the terms of the contract, it is confined to actual loss and damage.

The apparent object of the whole agreement is to make a bond with a penalty covering all forms of actual loss which the owner may sustain either by reason of loss or damage to the yacht or by reason of breach of the conditions of the contract.

I.

The Circuit Court of Appeals committed a fatal error in holding that the sum named in the two contracts, to wit, $75,000, was to be regarded

not as a penalty, but as liquidated damages; that for that reason judgment must be given for that amount, and that evidence of actual value, and therefore of actual loss or damage, was not to be considered.

The general principle in reference to the question whether a sum to be paid for the non-performance of an agreement is to be considered as a penalty or as liquidated damages, is stated thus by Mr. Chief Justice Marshall:

> "In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is, to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not of course be considered as liquidated damages; and it will be incumbent on the party who claims them as such, to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty, and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention."
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> *Tayloe* v. *Sandiford*, 7 Wheaton, 13 (at p. 17).

The powers of courts in this respect have thus been stated by the New York Court of Appeals:

> "Courts have felt embarrassed, when called upon to enforce inequitable, harsh or oppressive provisions in contracts, inserted often without reflection or a full knowledge of their legal effect, by a laudable desire to harmonize the abstract principles of right and justice with the established legal rules that parties are at liberty to make contracts for

> themselves, and that it is the duty of courts to enforce them as made. By a liberal use of the element of supposed intention they have been enabled to do so to a reasonable extent, and yet a reference to a few of the numerous authorities will illustrate the difficulties experienced in this respect (9 N. Y., 551; 21 *Id.*, 253; 1 *Id.*, 450; 5 Cow., 144, note *b*.; 3 J. Cas., 297; 22 Wend., 201; 2 T. R., 32; 11 Ind., 70; 8 Mass., 223; 5 Allen, 304; 13 Wend., 588; 12 Barb., 366; 17 *Id.*, 260; 15 Abb. Pr., 273; 38 N. Y., 74; 6 East., 529; 3 Par. on Con., 156). For the purposes of this case, we must regard the provision as a penalty.
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> *Noyes et al.* v. *Phillips*, 60 N. Y., 411.

The opinion of the Circuit Court of Appeals (pp. 6-7) holds, in substance, that the sum named in the contract, namely, $75,000, must be regarded as liquidated damages, and that the question of actual value of the property destroyed is to be disregarded.

The magnitude of this error is shown by the fact that it was proved by uncontradicted evidence, although the trial Court refused to consider it, that the value of the yacht in the summer of 1898 was not more than $30,000. It thus appears that, by this decision, the respondent is required to pay for a boat eighteen years old and of antiquated type a sum $45,000 in excess of what is proved to be her actual value.

This conclusion is reached by the learned Court of Appeals expressly upon the ground that the parties have stipulated as to the amount which shall be considered as liquidated damages. The Court would necessarily have reached the same conclusion, under its reasoning, if the amount at which the liquidated damages had been placed had been five hundred thousand or a million dollars, for it held that:

> "It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is,

in the absence of fraud or mutual mistake, conclusive upon them" (*Opinion*, p. 7).

We contend that the true rule of law, as set forth by all the highest authorities is precisely the reverse, and that the naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that *if the amount is disproportionate to the loss*, the Court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though specifically stated to be liquidated damages.

This principle is stated with great fullness and force by the Circuit Court of Appeals of the Fourth Circuit (1895) in *Gay Manufacturing Co.* v. *Camp*, 13 C. C. A. Reps., 137, at pp. 141 *et seq.* In this case a lease had been made by the Receivers of the plaintiff to the defendant of certain mill property at Suffolk, Va., at a rental of $10,000 per annum. The lease stipulated that in case of a breach by the lessees "in lieu of all such claim for loss or damage, the sum of five thousand dollars is now hereby estimated, assessed and accepted between the parties hereto *as liquidated damages* to be paid by the parties of the second part unto the party of the first part which the parties of the second part hereby declare to be due and promise and bind themselves to pay unto said party of the first part or its assigns immediately upon the termination or annulment or declaration of the termination or annulment of this contract by the party of the first part," &c.

It will be observed that no language could be more specific than this. The sum of five thousand dollars is stated to be "estimated, assessed and accepted between the parties hereto as liquidated damages." Not only that, but it is a sum "which the parties of the second part hereby declare to be due and promise and bind themselves to pay" upon the arising of the condition. The designation of liquidated damages

and the express promise to pay the sum named could not be made more explicit.

Before the expiration of the term the lessees defaulted in the rent, and on this default the lessors entered. Subsequently the amount of the rent due, which was about twenty-five hundred dollars, was paid. The question arose, as stated by the Court, "Are the lessors entitled to the payment of $5,000 as liquidated damages, under these circumstances?" As to this the Court said:

> "This will depend upon the question, Is the sum of $5,000 inserted as a penalty or as liquidated damages? 'Upon this subject,' says Deady, *J.*, in *Harris* v. *Miller*, 6 Sawy., 311; 11 Fed., 118, 'the law is peculiar, *and instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.*'
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> "In *Spencer* v. *Tilden*, 5 Cow., 150, the Court says: 'This doctrine, *which converts damages apparently stipulated or fixed by the parties into a penalty*, came from the civil law, through the Court of Chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, *Courts must disregard the particular expressions of the parties*, for the moment we agree that a party may by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specified default, secure the whole to himself without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases, and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal.'
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> "The rule laid down in *Barton* v. *Glover*,

Holt, N. P., 43, is: 'When a sum of money, whether in the name of a penalty or otherwise, *is introduced in a covenant* or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed or contract, and the penalty as the accessory, and therefore only to secure the damages really incurred.'

"The fact that the parties speak of it as liquidated damages is not conclusive. *Lampman* v. *Cochran*, 16 N. Y., 275. The doctrine is well stated by Sanford, *J.*, in *Bagley* v. *Peddie*, 5 Sandf., 192.'" (Here follow the rules laid down in the last cited case.)

"The principle derived from this quotation is that the circumstances of each case determine whether the sum stated be liquidated damages or a penalty; *and this without regard to the words used, perhaps sometimes in disregard of the intent of the parties;* and whenever it appears that the damages occasioned are easily estimated in money, the covenant is construed as a penalty. * * * 'The subject matter of the contract and the intention of the parties are the controlling guides. If from the nature of the agreement it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed to. But if, on the other hand, the contract is such that the strict construction of the phraseology *would work absurdity or oppression*, the use of the term "liquidated damages" will not prevent the Court from inquiring into the actual injury sustained, and doing justice between the parties' (2 *Sedg. Damages*, 215 (399, 400); 1 *Pomeroy Eq. Jur.*, Secs. 433, 444.) * * * It is quite impossible for any substantial damage to have resulted from the annulling of the lease a few days before the expiration of its term, and the exaction of a penalty of $5,000 as the consequence of such a default would be grossly excessive and inequitable. The judgment of the Circuit Court is affirmed, with costs."

It is submitted that there is a direct contradiction between the principle of law as laid down by the Circuit Court of Appeals in the case at bar and that enunciated in the case of the *Gay Manufacturing Co.*, last cited. There is little doubt that the Court which rendered the decision in the Gay case would have reached the conclusion in the present case that any stipulation requiring the payment of $75,000 as damages for the loss or non-delivery of an antiquated boat eighteen years old, which, according to the evidence, was not worth more than $30,000, was absurd and oppressive, would have relieved the respondent from its operation, supposing that it provided for so disproportionate an amount of damages, and would have admitted and considered and have reached a decision upon evidence of the actual loss and damage.

A petition for a rehearing in this case was denied at the Circuit Court of Appeals, before a court consisting of the Chief Justice and Goff and Simonton, *JJ.* It has therefore been concurred in by five Judges.

> Gay Mfg. Co. *v.* Bell, 25 U. S. App., 376.

Equally clear and forcible is the statement of the principle in the case of *Ward* v. *The Hudson River Building Company*, 125 N. Y., 230 (decided in 1891 by the New York Court of Appeals). In this case plaintiff had contracted to build four houses by a certain date, and that he should "pay to the owner ten dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated damages." After the default had continued for a considerable time, a new agreement was made, as follows:

> "It is mutually agreed that the sum, or penalty, due under said contract on March 25, 1888, shall be $1,540 by way of liquidated damages, unless four villas and all extra work are then entirely finished" (p. 233),

and the contract then contained the following further agreement:

> "It is further mutually agreed that in case said Ward fails to complete said villas on or before said 25th day of March, 1888, as aforesaid, there shall be due and owing to said Hudson River Building Company. its successors or assigns, the sum of $1,540 by way of liquidated damages, etc." (p. 232):

and there we find the rule laid down by Judge GRAY as follows:

> "Whether the sum agreed between parties to be paid, in the event of a breach of some agreement is termed by them a 'penalty,' or 'liquidated damages,' is not controlling upon the question of construction. Their use of such words is not always conclusive as to their legal meaning. To get at that we must consider the subject matter and nature of the agreement and understand clearly the intention of the parties. If it shall then appear that the damage and loss which may be presumed to result from non-performance are uncertain and incapable of exact ascertainment, then the payment or liabiliy fixed by them must be deemed to be liquidated damages and recoverable as such. *Where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportionate to the presumable or probable damage or to a readily ascertainable loss, the Courts will treat it as a penalty and will relieve on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance.* This subject has been reviewed in very many opinions; to a few of the more interesting of which, in the English reports, and in those of our State, I direct attention.
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> In *Lowe* v. *Peers* (4 Burr., 2228, 2229), Lord Mansfield, and in *Kemble* v. *Farren* (6 Bing., 141), Tindal, *C. J.*, discuss the subject. In *Dakin* v. *Williams* (17 Wend., 447, and 22 *Id.*, 201), Nelson, *Ch. J.*, in the first report, and Chancellor Walworth, in the second, re-

view the question in the light of the English and New York cases (see also *Hosmer* v. *True*, 19 Barb., 106; *Dampman* v. *Cochran*, 16 N. Y., 275; *Clement* v. *Cash*, 21 *Id.*, 253; *Little* v. *Banks*, 85 *Id.*, 258)."

The principle is here again distinctly stated that, notwithstanding a sum *has been stipulated as a payment for non-performance by the defaulting party*, if it is disproportionate to the presumable damage or loss, the Courts will treat it as a penalty.

In the present case, the Court not only refused to consider the question whether the amount stipulated was disproportionate, but they actually refused to consider any evidence from which the amount of presumable or probable loss could be inferred. They threw out the question of presumable, probable or actual loss altogether, and the libellant was not required to prove actual loss, nor was the respondent allowed to prove it as against the sum named in the contract.

To the same effect says Sedgwick:

"Sec. 396. *General Observations.* * * *

Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points: First, the language employed; second, the subject matter of the contract; and third, the intention of the parties. These are indeed the great elements of interpretations of all contracts. But in the case we are now examining, the courts, especially in this country, have generally shown a marked desire to lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. *The language of the contract is not controlling.* And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex.* * * * But if, on the other hand, the contract is such that the strict construction of the phraseology would work

absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties (see Noyes *v.* Phillips, 60 N. Y., 408)."

Sedgwick on Damages (8th Ed.), Vol. 1, p. 558.

SEC. 407.—*The liquidation must be reasonable.* The parties, then, must not only intend that the sum named shall be paid over to the plaintiff upon the breach, the sum must also be reasonable in itself (People *v.* C. P. R. R. Co., 76 Cal., 29; Perzell *v.* Shook, 53 N. Y. Superior Court, 501; Sleeman *v.* Waterous, 23 Up. Can. C. P., 195). In other words, in every case where a fixed sum is stipulated as damages, the Court will look to see whether the stipulated compensation is a reasonable one; and if not, they will require damages to be assessed as if no stipulated sum were named in the contract. In the words of the Supreme Court of Michigan: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside" (Marston, *J.*, in Meyer *v.* Hart, 40 Mich., 517-523).

So firmly is this principle applied that the liquidation provided by a contract may, as the circumstances show to be equitable, in one case be upheld, and in another set aside. Thus in Hahn *v.* Horstman, 12 Bush, 249, a case of a common building contract, which stipulated damages at the rate of twenty dollars a day for delay in completing the contract, the defendant left the work unfinished; and the plaintiff more than a year after the time for completion, brought suit, claiming damages for the whole time at the stipulated rate. If the work had been finished, though a few days after the agreed time, it is well settled, as will be seen, that the stipulated sum could be recovered. In this case, however, to allow recovery at the stipulated rate would be grossly in excess of compensation; and the Court refused to allow damages at the stipulated rate (acc. Greer *v.* Tweed, 13 Abb.

N.S., 427; Colwell *v.* Foulks, 36 How. Pr., 306). Some courts say that the damages must not be "grossly excessive" (Parr *v.* Greenbush, 42 Hun, 232); Some, that they must not be "unjust and oppressive," (Scofield *v.* Tompkins, 95 Ill.; 190); Mueller *v.* Kline, 27 Ill., App., 473; Higginson *v.* Weld, 14 Gray, 165). "Unreasonable" (Hardee *v.* Howard, 33 Ga., 533; Sutton *v.* Howard, 33 Ga., 536; Maxwell *v.* Allen, 78 Me., 32; Daly *v.* Maitland, 88 Pa., 384; Williams *v.* Vance, 9 S. C., 344; Schrimpf *v.* Tenn. Manuf. Co., 86 Tenn., 219). "Extravagant" (Gammon *v.* Howe, 14 Me., 250), or "disproportionate" (Jaqua *v.* Heddington, 114 Ind., 309; Haymaker *v.* Schroers, 49 Mo., 406; Staples *v.* Parker, 41 Barb., 648). But all seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach (Tholen *v.* Duffy, 7 Kas., 405; Stearns *v.* Barrett, 1 Pick., 443; Gowen *v.* Saltwarsh, 11 Mo., 271; Dennis *v.* Cummins, 3 Johns. Cases, 297; Burrage *v.* Crump, 3 Jones L., 330; Pennypacker *v.* Jones, 106 Pa., 237; Jones *v.* Queen, 7 Can., 570). Thus where a contract of hiring provided that, on the servant leaving without notice, whatever was then due to him should be considered as liquidated damages for the breach of his contract, it was held that the forfeiture would not be enforced by the courts. Since the arrears of wages might be large or small, the principle of compensation was clearly departed from by the parties (Richardson *v.* Woehler, 26 Mich., 90; Schrimpf *v.* Tenn. Manuf. Co., 86 Tenn., 219; Jones *v.* Queen, 7 Can., 570). But the forfeiture of a fixed reasonable sum would be allowed (Richardson *v.* Woehler, 26 Mich., 90; Schrimpf *v.* Tenn. Mfg. Co., 86 Tenn., 219; acc. Jones *v.* Queen, 7 Can., 570).

Sedgwick on Damages, (8th ed.), Vol. 1, p. 583.

SEC. 408.—*Language not Conclusive; Rule in Case of Doubt.* It follows from what has been said that the language of the contract is not conclusive. The question whether a stipu-

lated sum is to be allowed as liquidated damages is a question of law, and no agreement of the parties to call it a penalty or liquidated damages can decide the question.

Jaquith v. *Hudson*, 5 *Mich*, 123–136.
Sedgwick on Damages (8th *ed.*), *Vol.* 1, *p.* 586.

SEC. 410.—*Penal Sum Collateral to Object of Contract.*

Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages. In a contract for the sale of land for $8,000, payable, $5,000 on the first of January following, and the rest in three annual instalments, a clause stating that "in further confirmation of the said agreement the parties bind themselves, each to the other, in the penal sum of $1,000," is not to be considered as liquidated damages for the breach of this agreement, but as a penalty superadded (Robinson *v.* Cathcart, 2 Cranch C. C., 590; acc. Richards *v.* Edick, 17 Barb., 260; Law *v.* House, 3 Hill (S. C.), 268).

The plaintiff drew up and delivered to the defendant a written lease of land of the plaintiff, and the defendant agreed to return the lease in ninety days or pay $3,000 on failure to do so. It was held that this sum was wholly collateral to the loan of the written instrument, and was not liquidated damages (Burrage *v.* Crump, 3 Jones L., 330).

The defendant agreed to allow the plaintiff to use a certain building while it stood, and gave him a note payable on breach of the agreement. This note was held not to be enforceable, since it was in the nature of a penalty (Merrill *v.* Merrill, 15 Mass., 488). A penal bond comes ordinarily under this rule. In some exceptional cases, the penalty in a bond, as will be seen, is regarded as liquidated damages; but in general it is regarded as a penalty. So of a bond to submit to arbitration (Henry *v.* Davis, 123 Mass., 345), or to convey land (Brown *v.* Bellows, 4 Pick., 179; Robeson *v.* White, 16 S. and R., 320; Burr *v.*

> Todd, 41 Pa., 206). The rule is the same if such an arrangement is in the form of an ordinary contract. If an agreement to submit to arbitration is secured by a promise to pay a collateral sum of money on breach of the agreement, that sum is held to be a penalty, and payment of it is not enforced by the Court (Spear *v.* Smith, 1 Den., 464; Henderson *v.* Cansler, 65 N. C., 542). And though the use of the words, "penalty," "forfeiture," "liquidated damages," is not conclusive, it will be considered by the Court as indicating the intention of the parties as to whether the sum named was or was not regarded by them as compensatory (Reilly *v.* Jones, 1 Bing., 302; Van Buren *v.* Digges, 11 How., 461; Bignall *v.* Gould, 119 U. S., 495; Dyer *v.* Dorsey, 1 G. and J., 440; Stearns *v.* Barrett, 1 Pick., 443; Salters *v.* Ralph, 15 Abb. Prac., 273; Colwell *v.* Foulks, 36 How. Pr., 306; Williams *v.* Vance, 9 S. C., 344; Smith *v.* Wainwright, 24 Vt., 97)."
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> *Sedgwick on Damages* (8 *ed.*), *Vol.* 1, *p.* 583.

The disproportionate or oppressive amount of the sum named as liquidated damages has always been taken into consideration by the Court. Says the Court of Appeals in *Colwell* v. *Lawrence*, 38 N. Y., 74:

> "It is scarcely to be supposed that the parties intended to fix an amount so extravagant, and which would be, if allowed as claimed, so grossly disproportionate to the actual damages, as liquidated damages for so trivial an omission or delay, and I cannot discover any sufficient and satisfactory reason for any such inference or conclusion."

In *Peekskill R. R. Co.* v. *Peekskill*, 21 App. Div., 94 (October Term, 1897), while the sum named as liquidated damages was held to be such by the Court, one ground of its decision was that "the sum does not seem to be unreasonable in amount or disproportionate to the actual damage which may have been

sustained." The Court further says, referring to the various stipulations for damages in breaches of contract:

> "In some of them although the stipulation in words provided that the sum specified should be regarded as liquidated damages, the Courts construed it as meaning a penalty. But this was done to prevent great injustice being worked, and relieve from hardship."

The principle is therefore one of active and constant application in the courts to-day.

It will be seen that the New York Court of Appeals, like the United States Circuit Court of Appeals, in the Fourth Circuit, disregards the fact that "a sum has been stipulated as a payment by the defaulting party." This fact is overridden not, in this opinion, "by fraud or mutual mistake," but by a totally different consideration, namely, that the amount is disproportionate to the presumable or probable damage.

So far is this carried that in the case of the *East Moline Co.* v. *Weir Plow Co.* (decided by the Circuit Court of Appeals for the Seventh Circuit June 6, 1899, 37 C. C. A., 62), not only did the agreement expressly state (p. 65): "That the measure of damages for the default of either party to carry out this agreement shall be fifty thousand dollars," but each party alleged default on the part of the other, and claimed the entire sum, namely, $50,000, as liquidated damages. Notwithstanding the express statement in the agreement where that phrase is used, notwithstanding the claim and admission made by both parties that such was the meaning of the contract, the Court, when it found for the defendant on its counterclaim, refused to consider the amount named as anything but a penalty.

The Circuit Court of Appeals further held, as a fact of which the Court could take judicial notice,

that the market value of a yacht—not only this yacht, but any yacht—was an "uncertain quantity" (*Opinion* C. C. A., p. 6), and that from this assumed "difficulty of estimating exact damages, the intention of the parties to consider it as liquidated damages may be inferred" (p. 7).

The rule by which a court may regard the sum mentioned in a contract as liquidated damages, rather than as a penalty, by reason of the impossibility of ascertaining actual damages, is a familiar one; but we doubt if it has ever been applied before, as the Circuit Court of Appeals applies it, to the question of determining the value of a specific vessel. The Court apparently holds that, as matter of law, the value of a steam vessel of this character is not ascertainable. No authority can be referred to which makes such an extension of the principle.

In the case of the *East Moline Plow Co.* v. *Weir Plow Co.* (Seventh Circuit, June 6, 1899), 37 C. C. A., 62, this question received considerable attention. As already stated, the provision of the agreement in that case was "that the measure of damages for the default of either party to carry out this agreement shall be $50,000." The decision turned specifically upon the application of this provision to a number of different acts of default of varying importance, but the Court held that such a provision as that stated in the contract could only be considered as liquidated damages (p. 68) "where it is evident that the damages for a breach would be uncertain in their nature and impossible of ascertainment by a jury"; or, again, "where the damages for such a breach being entirely uncertain and speculative in character"; or, again, "where the damages for a non-performance * * * are not measurable by any exact pecuniary standard." The last phrase occurs in the case of *Trower* v. *Elder*, 77 Ill., 452, cited with approval in the *East Moline* case.

In *Ward* v. *Hudson River Building Co.*, 125 N. Y., 230, the Court said:

> "We may at most say that where they have stipulated for a payment in liquidation of damages which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not on the face of the contract out of all proportion to the probable loss, it will be treated as liquidated damages."

An examination of the cases which hold that damages shall be considered as liquidated "where it is evident that they would be uncertain in their nature and impossible of ascertainment by a jury" or "speculative in character," or "not measurable by any exact pecuniary standard" shows that they apply to an entirely different state of facts from that presented here.

Thus in *Bagley* v. *Peddie*, 16 N. Y., 469: Here the bond was stated to be "in the sum of three thousand dollars, as liquidated damages and not by way of penalty or otherwise," for the performance of the covenants in a written agreement. One of the covenants was "not to reveal the secrets of a trade in which the principal obligor was to be employed," &c., and it was held "that a breach of this covenant involved damages so uncertain and difficult to be ascertained as that the sum named in the bond should be deemed not a penalty, but liquidated damages."

In *Dakin* v. *Williams*, 17 Wend., 447, the defendant, having sold out his business, agreed not to carry it on in the county, and fixed and liquidated $3,000 as the damage if he violated that provision. This was held to liquidate the damage, because the real damage was uncertain.

Among the other cases where damages were held to be uncertain, and, therefore, supported an agreement for liquidated damages, was one for damages for not assigning a lease (*Knapp* v. *Maltby*, 13

Wend., 587); an agreement not to carry on the business of perfumery in London (*Price* v. *Green*, 10 Mees. & Wells., 346); an agreement of one attorney with another not to carry on the business of attorney within fifty miles or interfere with or solicit the clients of the late copartnership (*Galsworthy v. Strutt*, 1 Wells., Hurl. & Gord. Exch. Reps., 659); the failure to complete four houses on the day specified (*Ward* v. *H. R. B. Co.*, 125 N. Y., 230).

On the other hand, a refusal to abide by an arbitrator's decision, when the decision made a money award, was held to be certain (*Spear* v. *Smith*, 1 Denio, 464). In *Kemble* v. *Farren*, 6 Bing., 141, a manager brought suit against an actor for a violation of an agreement to perform at Covent Garden for four years, the plaintiff had agreed to pay the defendant a fixed sum every night the theatre should be open. The agreement provided for a payment of "one thousand pounds liquidated damages, and not as a penalty or penal sum, or in the nature thereof," for a default by either of the parties in any provision of the agreement. The default was on the part of the actor, and the question arose as to whether the clause providing for liquidated damages was not supported by the uncertainty of the agreement; but the Court held that, as a certain sum was to be paid to the defendant, the agreed damages could not have been considered otherwise than as a penalty as to such fixed sum, and must be construed in the same way in respect to those covenants of which the breach would result in uncertain damages.

The above cases illustrate the nature of the distinction between certain or ascertainable and uncertain or speculative damages, in other words, damages for non-performance of a contract which are or are not "measurable by any exact pecuniary standard." The damage suffered by the practice of a rival in business, by the failure to assign a lease, by the revelation of trade secrets is clearly of such an uncertain character. That the value of a given vessel should be put in the same category, that it should be

decided, as matter of law, to be unascertainable, to be not measurable by any pecuniary standard is, we submit, an absolutely novel proposition. This is not a question of damages for loss of use. It is a question of damages for the loss of a ship. The fact that the ship is a yacht makes no difference. It is a specific article, the product of one of the ordinary forms of manufacture, and the cost of manufacture of this article is readily ascertainable; the value of the materials and labor which enter into its construction are determinable with the utmost facility. There are great numbers of persons who are entirely competent to give evidence as to the value of such a vessel. It is as readily ascertainable as the value of any other product of manufacture. It is not even an unusual or uncommon product of manufacture. The question of fluctuations in value does not here arise. The only question is: "What was the value of the yacht, assuming her continued existence, at the time she was required to be redelivered?" Her master said $30,000, and doubtless other estimates might have been made, as is frequently the case where questions of value arise in courts of law, but the question is nevertheless one which, in such a Court, would undoubtedly have been considered a proper question for the jury. Certainly a maximum value could have been ascertained, which this respondent has a right to contend should be a limit of liability. Nor would it occur to any one, in so submitting the question of value to a jury, that it was one which a jury could not determine by any exact pecuniary standard. In an age and country where juries in every great city are daily called upon to determine, and do determine, the damages for the loss of a leg, or an arm, or any other member, for the obscure consequences of disease or wounds, for a loss of human reputation or a loss of human life, it seems idle to say that, as matter of law, a jury could not determine the value of a yacht. In the case of *The Conqueror*, 166 U. S., 127, Mr. Justice

Brown said, referring to the value of the use of a yacht:

> "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, *as it is only in the larger ports that there can be said to be a market price for the use of vessels*, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.
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> The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of Sturgis *v.* Clough passed, too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much greater certainty than it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market."
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> *The Conqueror*, 166 U. S., pp. 127 and 134.

This Court, in passing upon the question, did not disturb the conclusions as to damages for the loss of use of the yacht reached by the Court below. It is quite evident, however, from the language of Mr. Justice Brown in the opinion, that, while there might be some difficulty in ascertaining the damage

consequent upon the loss of use for a period of time, although not an insuperable difficulty, there would be no difficulty at all in determining the value of the yacht itself, especially in the larger ports.

POINT II.

Assuming that the respondent was liable for the loss of the yacht, and that its liability was to be computed on the basis of the sum named in the alleged charter-party, the liability should still have been reduced by the sum already paid for the hire of the yacht, namely, $10,000.

Such was the opinion of Judge Brown in the trial Court, which was overruled by the Appellate Court.

The principle here involved is the simple and familiar one that where a surety has given a bond conditioned on the non-performance of certain agreements, and limiting his liability to a specific sum, any payment of the surety to the obligee on account of the provisions of the agreement discharges to that extent his liability on the bond, and recovery must be limited to the extreme amount named in the bond, less the amount which has been already paid on account of this liability. In regard to this question, three principles are to be noticed:

(1.) The last clause of the contract of suretyship limits the total liability of *The Sun* to the sum of $75,000. It reads:

> "That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars."

Reading the two instruments either together or separately, it is apparent that the meaning of this clause is that *The Sun*, in fulfilment of this alleged charter-party and agreement of suretyship should not be called upon to pay more than $75,000 as an outside limit.

(2.) There is nowhere to be found in either instrument any specific promise to pay the sum of $75,000 in case of the loss or non-return of the vessel. In order to assume any such promise or covenant, it must be read bodily into the contract.

(3.) The agreement of suretyship was to cover not only losses and damages which might occur to the boat or its belongings, but also the breach of any of the terms or conditions of the contract. The agreement of suretyship, therefore, secured not only numerous minor covenants of the charter-party, but also the covenant to pay the rental of the yacht, namely, $10,000.

It follows that the payment of the rental of $10,000 is one of the payments covered by and included in the aggregate maximum liability of the *The Sun;* that the covenant to pay the rental was executory, as the amount was paid after the signing of the agreements, and that, consequently, *The Sun* is entitled to have a deduction to that extent from its total liability. The reasoning of Judge Brown upon this question, which will be found in the *Transcript of Record*, pp. 355-7, seems to us to be unanswerable, and the question of law involved is of such importance that it should be passed on by the highest authority.

Says Judge Brown (fols. 1418-1420):

> " And the security required to be given by the terms of the charter and by the agreement of suretyship, which was in fact given and delivered at the same time the charter was signed, includes therefore the payment

of the charter hire as well as the performance of the many other obligations contained in the charter. The charter hire of $10,000, as the evidence shows, was paid by *The Sun's* check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16th. So much of its obligation of $17,000 has, therefore, been discharged by *The Sun;* and the express provision of the second instrument, called the agreement of suretyship, is that in no case shall the liability of *The Sun* exceed the sum of $75,000."

POINT III.

The respondent, not having authorized the execution of the alleged charter-party and agreement of suretyship, and not having ratified either of them except as to the user of the yacht, is not bound as to their special provisions beyond the ordinary liability of a bailee.

The alleged charter-party and agreement of suretyship were executed by Chester S. Lord, managing editor of one of the two newspapers published by the corporation, that is to say, the morning newspaper called *The Sun*. He was not an officer of the respondent, nor a director or trustee, nor even a stockholder. The alleged charter-party was in his name as the hirer, and the respondent is not referred to in any way therein except in the words, "For The Sun Printing and Publishing Association," following the signature. The so-called agreement of suretyship is signed in the same way, although it purports in the body of the document to be an agreement made by "The Sun Printing and Publishing Company." The evidence in the case

shows an entire absence of either a general or a special authority on the part of Mr. Lord to bind The Sun Association by either of these specific contracts (*Transcript of Record*, pp. 319-320, fols. 1274–1280; Testimony of President Dana), nor was there anything in his office which would lead to an inference that he was clothed with such authority. The evidence also shows that the Board of Trustees never took any action upon these agreements of Mr. Lord; and that, as individuals, they were not aware of their contents. There could of course be no ratification without knowledge.

Judge BROWN, in his opinion, in speaking of the charters, says:

> " Many circumstances, however, are brought out in the evidence in regard to the conduct of the parties during the charter period, as well as before, from which no doubt is left in my mind that these contracts must be deemed legally to be the contracts of The Sun, the defendant; that Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts; that he intended to bind the defendant and not himself, and that the trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht, and such perfect means of knowledge of all the particulars, had they desired to know them, as to make their acts in using the yacht under the charters, as they did, a ratification of Mr. Lord's action, and to bind them for the performance of his agreements made in their behalf."
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> *Transcript of Record*, pp. 352-353, fols. 1408-1409.

It will be seen that Judge Brown held that " Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts," but we submit that there is no evidence upon which such authority can be predicated.

The principles which are opposed to this decision are so familiar that it is hardly necessary to cite authorities from them. A few of them may, however, be referred to:

"Underlying the whole subject there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent."

Mechanics' Bank *v.* New York & New Haven R. R. Co., 13 N. Y., 632.

"As such agents neither appoint themselves nor prescribe the limits of their own authority, the fact that a person not being the officer or agent of a corporation claims to be such, or being such officer or agent claims to possess power which has not been conferred upon him, will not, subject to the exceptions elsewhere noted, bind the corporation."

4 Thompson on Corporations, Section 4880.

"But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts:

"1. That the act was done in the exercise; and.

"2. Within the limits of the powers delegated."

Mechanics' Bank of Alexandria *v.* The Bank of Columbia, 5 Wheaton, 337.

"One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority."

Alexander et al. v. *Cauldwell et al.*, 83 N. Y., 480.

"It would seem to be the general rule that no acts of an agent can be resorted to to establish a power not included within the terms of his commission, except those which are brought to the knowledge of his principals and are approved or acquiesced in by them."

Bickford *v.* Menier *et al.*, 107 N. Y., 493.

"While a principal is bound by his agent's acts when he justifies a party dealing with his

agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent.

That is, he is bound equally by the authority he actually gives, and by that which, by his acts, he appears to give.

For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. *The fundamental proposition is that one man can be bound only by the authorized acts of another.* He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

Edwards et al. v. *Dooley et al.* (*June*, 1890), 120 N. Y., p. 551.

The form of the instruments is enough to show to any one with the slightest experience in such matters that they were not done in pursuance of a formal exercise of a corporate authority. They were alone sufficient to put the other party upon notice.

"The principle under consideration does not extend so far as to allow the authority of an agent to do a particular act to be proved by proof of his having previously done *a few similar isolated acts*, the doing of which has been tolerated by the corporation; but there must have been such a uniform course of conduct, in the face of those entitled to oppose, as would justify a man of reasonable prudence in concluding that there had been an antecedent authorization."

4 Thompson on Corporations, Sec. 4886.

The above proposition disposes of the suggestion that because a vessel had been hired by Lord on one or two previous occasions his authority to execute these instruments could have been inferred.

The essential point here is that Lord was not an

officer of the corporation, and was not authorized in any way to bind it.

There can be no ratification of the acts of an agent without full knowledge on the part of a principal of all the facts, and there must always be, moreover, an intention on the part of the principal to ratify the unauthorized act of the agent. In this case, there was never any knowledge of the terms of the charter-party, or even of its existence, by the corporation or its officers, until after the loss of the yacht. There was no knowledge of the penalty fixed in the bond or of the valuation of the boat at $75,000, for, as to this matter, and all the other terms of the charter-party, the officers of the corporation were in absolute ignorance. There was, therefore, no intention on the part of the corporation, as principal, to ratify the terms of the charter-party. It was held by the N. Y. Court of Appeals in a recent case decided April, 1898, *Merritt* v. *Bissell*, 155 N. Y., 396, that —

> "A ratification of the unauthorized act of an agent or of a stranger who claims to act as such, if it exists, must be found in the *intention* of the principal, either express or implied. If that intention cannot be shown, no ratification can be held to have been established. While it is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge, or otherwise, in some cases, he makes the act his own, still, where one who has assumed to act as an agent for another has no authority to do so, but is a mere volunteer, a failure to disavow his acts will not amount to a ratification, unless under such circumstances as indicate an intention to do so" (pp. 400, 401).

This case in the Court of Appeals, *Merritt* v. *Bissell*, is important, for the Court of Appeals there decided unanimously that a payment of $500 by the defendant to the plaintiffs on a contract, did not constitute a ratification of the unauthorized contract, and the Court of Appeals reversed the unanimous

judgment of the Appellate Division of the Third Department (reported 84 Hun, 194), where the opinion had been rendered by Mayham, *P. J.*, and had been concurred in by Justices Putnam and Herrick. And this case would seem to be a sufficient answer to the theory of the libellant that the payment of $10,000 for the user of the yacht was a ratification of the terms of the charter-party.

It appears affimatively in the case that until the yacht was lost, the directors or trustees of the *Sun*, either as a board or as individuals, knew nothing about the papers in issue or the terms of the charter-party or agreement of suretyship, and where there is absolute ignorance, there can be neither ratification nor acquiescence.

Judge Thompson says in his Book on Corporations at Section 5298:

> "It is a well-settled principle in the law of *agency* that a principal may ratify the unauthorized acts of his agent by *acquiescence*, or even by *silence*, after being *fully informed* of the facts and circumstances attending the unauthorized act" (*Story on Agency*, Sec. 255; *Wharton on Agency*, Sec. 86; *Courcier* v. *Ritter*, 3 Wash. (U. S.), 549).

> "*Ratification presumes the existence of knowledge of all the facts, and the Court could well say, from all that appeared, that he was not informed of the whole transaction, and consequently was in no position to ratify the wife's act*" (Kelly *v.* Geer, 101 N. Y., 664).
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> *Hommel* v. *Meserole*, Second Department, May Term, 1897, 18 Appellate Div., pp. 109, 110.

Even in the case of a contract made by a Vice-President and General Manager, the Court will not uphold it where there is an absence of authority and an absence of ratification. Such were the facts in the case of Camacho *v.* Hamilton Bank Note Co.,

decided by the Appellate Division of the First Department (New York). Judge Patterson says:

> "But it is claimed by the plaintiff that in making his arrangement with Gray, he was entitled to rely upon the apparent authority which he exercised as general manager, and upon the assumption that as general manager it was within his province to make this contract of employment. In the absence of proof of what exact authority belongs to a person descriptively styled a general manager, there is no rule by which a court can be guided in determining what the powers of such an official really are, except such as the evidence in a particular case may furnish of what the person has done in the general course of the business of the corporation. That the words "general manager" would import that the person bearing that title is a general executive officer for all the ordinary business of the corporation is all that may properly be inferred, and this would justify, in connection with proof of acts done, a conclusion that all ordinary contracts made by such an official are authorized by the corporation. But no presumption of law can be indulged in that, because a person acts as such a manager, he has the power to bind his principal *to contracts of an extraordinary nature* and of such a character as would involve the corporation *in enormous obligations and for long periods of time.* If a general manager, simply by virtue of his being charged with the ordinary conduct of the business, would have the right to bind his principal to a contract for service for three years, involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods and thus assume to himself a power which it cannot be supposed was ever intended to be lodged in him?
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> But here we find that the evidence completely fails to established the ratification. Certainly it is not to be deduced from any relation to the subject of Mr. Seebeck, who was president of the company at the time the let-

ters were written. The plaintiff testifies that Mr. Seebeck was in and out and saw him rendering services. *The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing.* Nor is it a ratification of *any terms or conditions* of any employment which might have been made without due authority (Harrington *v.* Bank, I. T. & C., 361).

* * * * *

We are of opinion that, upon the whole case, the court was right in rejecting the evidence of the two letters alleged to have constituted the contract, and upon these grounds:

FIRST.—That it is not to be inferred as matter of law that an agent who was a mere general manager of a business, by which term is meant one charged with the executive administration of the current business of the corporation, has the authority to bind his principal to any contract to run for a series of years, in the absence of proof of authority to make such a contract.

SECOND.—That, while such authority may be inferred from evidence of acts of the general manager, known to and acquiesced in by the officers of the corporation, yet the proof in this case is wanting in that element, and there is no proof of such acts as would have justified the plaintiff in relying upon an apparent authority to make the contract on which this action is brought.

THIRD.—*That there is no proof of ratification with knowledge of the contract.*

The plaintiff having sued on the contract, and not upon a *quantum meruit*, and the effect of a judgment in his favor being to make a binding adjudication entitling him to recover for subsequent breaches, the judgment must be affirmed, with costs."

VAN BRUNT, *P. J.*, WILLIAMS, O'BRIEN and INGRAHAM, *JJ.*, concurred.

Camacho v. *Hamilton Bank Note and Eng. Co.*, 2 Appellate Division Rep., pp. 371-374.

The fact that the corporation had the use of the yacht and paid for such use the sum of $10,000, and that its officers did one or two minor acts in reference to the vessel, indicates a ratification only so far as it regards the mere hiring at a specific rate. The absence of all knowledge or ratification of the particular terms and conditions of these extraordinary agreements absolved the corporation from liability under them. Its liability then becomes that of an ordinary case of bailment, where the bailee, having hired the article in question, is under a liability established by the law to redeliver the article, assuming that the article is still in existence; or, at most, if the article has been lost or destroyed through the negligence of the bailee, to answer in damages for the value of the article destroyed. It is not necessary that such a contract of hiring should be written, and the rights and duties that flow from it are matters of easy determination in law.

This ordinary contract, express or implied, for the user of the yacht may be said to have been ratified by the action of the association in keeping the vessel in service, paying her hire, &c. To suppose, however, that this includes such extraordinary provisions as are to be found specifically in the present alleged contract, as, for instance, that which affixes a value to the vessel at more than double her actual value; that which furnishes a guarantee or security of $75,000 to secure any and all losses and damages sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms and conditions of the contract; that which prescribes a demurrage of $500 a day for each and every day's detention after the alleged charter-party had expired—all these are stipulations quite outside the provisions of the ordinary contract of bailment, and the surety cannot be held responsible therefor in the absence of its knowledge, of any authority on the part of the agent, or of any knowledge or

ratification on the part of the trustees. The existence of such unauthorized and unratified covenants vitiates the whole contract, and sets the parties back to the remedy of a *quantum valebat* under an ordinary implied contract of bailment, by which the stipulated rent would require to be paid and the property be redelivered at the expiration of the term.

Assuming that this is a case of such an implied contract, nothing could be predicated on the use of the yacht or payment of the charter money in respect of ratification except that the general terms of the implied contract of bailment were ratified; and, as Judge Patterson says, in the case last cited:

> "The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing. Nor is it a ratification of any terms or conditions of any employment which might have been made without due authority."

POINT IV.

The breach of the contract, alleged as the ground of recovery, being the failure to redeliver the vessel, the case falls within the principle that where a contract has been made to deliver a specific thing, and the thing has in the meantime been destroyed, no obligation rests upon the contracting party to deliver it or answer in damages unless the destruction was due to his negligence.

Upon this question the leading case is that of Young *v.* Leary (decided in the New York Court of Appeals), 135 N. Y., 569. This was an action brought

against Leary, the surety on a charter-party of one McKay. The provisions of the charter-party were in some respects similar to those in the case at bar. There was a contract on the part of the charterer to insure the vessel for the benefit of the owner during the term of the charter-party, which expired in the month of October. This covenant in the contract was duly performed. It was also provided that all other losses not covered by the policy described during the term of the charter-party should be paid by the charterer. The charter-party terminated in October, at which time the parties were negotiating for a purchase and sale of the vessel. The negotiations fell through, and the vessel remained in the possession of the charterer and was so situated when she was destroyed in the following January. There was the usual stipulation for the redelivery of the vessel, which obligation, however, was one that would have devolved upon the charterer without any written contract. It was held that the stipulation in reference to insurance did not impose any liability for the loss upon the charterer, in the circumstance, because the term of the charter-party had expired, and the owner, by permitting her retention subsequent to the expiration of the charter-party, had waived the default in the covenant to redeliver on the date named, but only as to the specific date. The question then was, could the plaintiff recover for the failure to redeliver subsequently, after the vessel had been lost? Said Mr. Justice Peckham, in delivering the opinion of the Court:

> "The questions in this case arise out of a charter-party executed on the 17th of October, 1884, by the Washburn Steamboat Co., and one McKay, for whom the defendant became surety. The company on the day mentioned let and McKay hired the steam propeller called the *Alicia A. Washburn*, of which the company was the owner, for the term of twelve months, from October 17, 1884, to be employed in lawful trade be-

tween Key West and other points on the West Florida coast on the terms and conditions mentioned in the charter-party. Among other provisions thereof was one by which McKay agreed to procure a fire and marine insurance policy for $27,000 for one year on such boat, in the name of the company, and to pay the premium thereon as an additional consideration of the charter. McKay also agreed to pay a certain rent per month for the use of the boat, commencing on the 17th of October, 1884, and also agreed that on the termination of the charter he would '*deliver the said steam propeller to the Washburn Steamboat Company, or their legal representatives, in New York harbor, in the same good condition as she is now in, ordinary wear and tear excepted.*' Another provision in the charter-party was as follows: 'That said McKay hereby assumes all fire, marine and other risks of damage that may happen to said vessel and also assumes all liability of every kind and nature, for which said propeller or its owners may be responsible during the term of this charter, which is not covered by fire and marine insurance hereinbefore mentioned.'

McKay procured in the name of the company a fire and marine policy of insurance upon the vessel for $27,000, for one year from October 17, 1884, and paid the premium thereon as he had agreed to do in the charter-party.

The vessel was burned at sea in January, 1886."

Idem, pp. 572, 573.

The Court further said:

"The remaining obligation of McKay under this charter-party is contained in that provision by which he agreed in the language already quoted, to deliver the vessel to the company in New York harbor.

It has been claimed on the part of the plaintiff in the courts below, and it is now urged here that this promise to deliver was on its face an absolute and uncondi-

tional one and a failure to fulfill it would not be excused by the entire destruction of the vessel before breach and without fault on the part of the charterer. It is true that the vessel was not destroyed at the time when by the terms of the original promise McKay had bound himself to deliver it in New York harbor. The question is whether the contract to deliver was absolute and only to be complied with by an actual delivery within the time agreed upon, or whether a destruction of the thing hired before breach and without the fault of him who hired it would not absolve the latter from his contract. If it would, there is the further question whether the facts herein do not show a waiver of the contract to deliver at the specified date and an implied extension of the time for such delivery and the destruction of the vessel within the time thus extended without the fault of the hirer. Or at least whether the facts proved were not enough to permit a finding of the fact of such waiver and extension.

* * * * *

We do not think that the law applicable to the class of cases of which that of *Harmony* v. *Bingham* (*supra*) is a conspicuous example applies here.

The contract in this case comes, as it seems to us, under another class which relates to the hiring for use of the thing hired and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. *Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused.* If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand and without fault on the part of the bailee, he is excused. (Williams *v.* Lloyd, W. Jones, 179; Sparrow *v.* Sowgate, *Id.*, 29.) Mr. S. Martin Leake, in his Digest of the Law of Contracts, at page 706, says: 'The authorities establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning,

have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the default of the contractor' (pp. 576-577).

* * * * * *

When language like that found in this agreement is used, the condition of continued existence is implied, and as thus interpreted it creates nothing more of an obligation than that which the law raises without any such promise. When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it. So it was held in the case of *Ames* v. *Belden* (17 Barb., 513), where the defendant was sued for its value for not returning a steamboat according to the condition of the charter-party, by which defendant agreed to return the same at the expiration of the term in as good condition as it then was, excepting ordinary use and wear. The Court said the language must be held to have reference to the ordinary obligation of such a bailee to return the article hired, and defendant was exempt if before the time arrived. the article had been destroyed without his fault. This is only another way of saying that *an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and if in the meantime it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed.* The case is thus entirely sup-

ported by the cases above cited" (pp. 577–578).

It seems to me as if authorities are not required upon the proposition that in a contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made, for, to again quote the language used by Mr. Justice BLACKBURN in *Taylor* v. *Caldwell* (*supra*): 'In the course of affairs men in making such contracts in general would, if it were brought to their minds, say that such should be the condition.' There is nothing in the other portions of the charter-party which affects in any way to the detriment of the defendant this particular question. If there had been no provision for insurance, and the vessel had been destroyed by fire before the 17th of October, 1885, and without the fault of McKay, it seems to me plain that neither he nor his surety, the defendant here, would be liable on the promise to deliver the vessel in the harbor of New York. The provision for insurance was complied with by McKay, and hence no liablility attaches by reason of it" (pp. 578, 579).

In that case it appeared that Leary, the surety of McKay, had insured the vessel against loss by fire in the sum of $17,000, and had collected the insurance and had retained it for his own use and benefit, and the Court said that it might be that the plaintiff would have an action to recover from the defendant the amount of the insurance as for money had and received by the defendant to his use.

In the opinion delivered by Judge Wallace for the Circuit Court of Appeals the principle is stated thus (p. 4):

"A contract of hiring presupposes the continued existence of the thing hired during the term of hiring, and because the parties must have known that otherwise it could not be fulfilled, and the whole contract is founded upon that understanding; the courts have construed express promises for the redelivery of the thing in as good condition as

> when received as intended merely to stand for the implied condition, and not as intended to impose a more stringent liability upon the hirer. Such a case was *Young* v. *Leary* (135 N. Y., 569). That was an action to recover of a charterer the value of a vessel which was destroyed during the charter term by fire, and was brought for the breach of a condition in the charter to deliver the vessel to the owner at its termination 'in the same good condition as she is now, ordinary wear and tear excepted.' The Court read the condition as intended to create no other obligation than would have been raised by implication without it, and said: 'When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.' Decisions to the same effect are *Ames* v. *Belden* (17 Barb., 513), and *Hyland* v. *Paul* (33 Barb., 241)."

In other words, the liability under the contract was the ordinary liability of a bailee.

But the Court, having thus stated the law as enunciated in Young *v.* Leary, goes on to say:

> "On the other hand, the Supreme Court of Massachusetts decided in an action brought to recover damages to the article hired caused by accidental injuries, where the contract contained a condition to return it 'in as good order as when received, customary wear and tear excepted,' that the bailee was not excused from performance. Harvey *v.* Murray (136 Mass., 377)."

Judge Wallace then goes on to adopt the supposed doctrine of these Massachusetts cases, thereby distinctly overruling Young *v.* Leary, which has always been regarded since it was decided as being the settled law, and which was generally held to have overruled the earlier cases.

The case of Harvey *v.* Murray, 136 Mass., 377 (decided in 1884), has no application here. It was a

case of hiring, where the defendant hired the plaintiff's piano, with an agreement "to return it in as good order as when received, customary wear and tear excepted." The piano was injured in a storm, and the Court rightly held that the defendant was required to make good the injury. Obviously this has nothing to do with the question of the impossibility of performance by the destruction of the *res*.

Drake *v.* White, 117 Mass., 10, a still earlier case, cited by Judge Wallace, is a case where a safe was held by the defendant as collateral security for debt and an express promise in writing was made by the defendant upon payment of the note to redeliver the safe "or its equivalent in money." The safe was destroyed by fire, and the Court held that the impossibility of performing one part of the alternative promise did not relieve the defendant from the obligation to perform the other.

Neither of these cases affects the question in the case at bar.

The cases of Warth's Executrix *v.* Mack, 51 U. S. App., 133, and Burrill *v.* Crossman, 35 U. S. App., 608, have no application to the present case. The first was a case where the parties contemplated the event of the destruction of the thing in question and made an agreement providing for that event. The Court decided that they must be held to that agreement. The second was an action for demurrage in the unloading of a cargo at Rio at the time of the revolution. There the acts of the revolutionists were one of the reasons alleged to justify the inability of the parties to unload. The Court held that the obligation of the charterer to have his work completed within that period, whatever circumstances occurred, was one that could not be met by the suggestion that the revolution caused delay.

Of course, in the present case, if the destruction occurred through the negligence of the bailee, the latter would be liable for the actual loss. The decision of the Court, however, did not turn upon this

question, but solely upon the fact of failure to redeliver the vessel.

The matters of law upon which it is contended by the petitioner that the Court erred, by reason of which the writ of *certiorari* should issue, are as follows:

1. Where a sum is named in a contract of suretyship as liquidated damages, even though expressly so named, the Court will not regard it as anything more than a penalty, when the amount specified is disproportionate to the presumable or probable loss.

This principle, asserted with great clearness and emphasis by the Circuit Court of Appeals in the Fourth Circuit and affirmed on an argument for a rehearing, with the concurrence altogether of five Judges, including the Chief Justice, asserted likewise repeatedly by the Court of Appeals of the State of New York, is absolutely rejected and reversed by the decision in the case at bar, which not only disregarded the general principle, but, by affirming the judgment of the trial Court, rejected from consideration all evidence as to probable, presumable or actual loss.

2. The virtual adoption of the doctrine that, as matter of law, the value of a specific yacht was of so uncertain and speculative a character as to be incapable of measurement by pecuniary standards and to be impossible of ascertainment by a jury.

3. The proposition that, assuming that $75,000 was to be taken as the value of the yacht, the payment made by the respondent association of $10,000 should not be applied, as directed by the trial Court, as a payment *pro tanto* of its maximum liability of $75,000, and the decision that the sum of $75,000 must be paid in addition to the $10,000 called for by the covenants in the contract, making a total payment on account of this yacht of the sum of $85,000, with costs.

4. The setting up of the principle that, where a contract in writing has been made by an unauthorized agent, without knowledge of his principals in respect to its details, and without ratification, the contracting party is as much bound by all the onerous provisions of such a contract as if he had entered into it with full knowledge or had expressly ratified it; when, in point of law, it is clear that the only ratification which the corporation had made was a ratification of the general contract of hiring, or the contract for the user of the yacht. In fact, the only thing which could be presumed to have been ratified by the respondent corporation was the implied contract of bailment.

5. The attempt to reverse Young *v.* Leary and other high authorities by holding that the destruction of the thing to be redelivered did not absolve the bailee, unless the destruction was in consequence of its own negligence.

All these points are fully covered by the assignment of errors.

A very full assignment of errors was filed by counsel for the respondent, setting forth, among other things, various errors in the admission of incompetent and irrelevant evidence.

Transcript of Record, pp. 361–372, fols. 1441–1488.

FIRST.—As to the lack of original authority in the making of the contracts.

> "EIGHTEENTH.—It appears by the record that the Court erred in holding that the alleged contracts, the charter-parties or charters executed by Chester S. Lord, the Managing Editor of *The Sun*, were legally the contracts of *The Sun*, the defendant."
>
> Assignment of Errors, *Transcript of Record*, p. 370, fol. 1478; Opinion, *Transcript of Record*, p. 352, fol. 1408.

"NINETEENTH.—It appears by the record that the Court erred in holding that Chester S. Lord had such general authority as was sufficient to enable him to enter into these contracts or charters."

Assignment of Errors, *Transcript of Record*, p. 370, fol. 1479; Opinion, *Transcript of Record*, p. 352, fol. 1408.

SECOND.—As to ratification.

"TWENTIETH.—It appears by the record that the Court erred in holding that the Trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht and such perfect means of knowledge of all the particulars had they desired to know them, as to make their acts in using the yacht under the charters as they did, a ratification of Mr. Lord's actions, and to bind them for the performance of his agreements made in their behalf."

Assignment of Errors, *Transcript of Record*, p. 370, fols. 1479, 1480; Opinion, *Transcript of Record*, pp. 352-353, fols. 1408, 1409.

THIRD.—As to liability.

"TWENTY-FIRST.—It appears by the record that the Court erred in holding that the yacht having been a total loss, the defendant under the agreement in the charter 'to be liable and responsible for any and all loss and damage "as well as by the agreement to surrender the yacht" in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted' as well as under the agreement of suretyship so called engaging that the hirer should 'well and faithfully perform and fulfill everything in and by said agreement on his part to be kept and performed' became liable to the libellant for his loss and damage through its failure to

return the yacht on the first of October when the charter expired."

Assignment of Errors, *Transcript of Record*, pp. 370, 371, fols. 1480, 1481. Opinion, *Transcript of Record*, p. 354, fols. 1415, 1416.

"TWENTY-NINTH.—It appears by the record that the Court erred in granting a decree to the libellant for $65,000, with interest and costs."

Assignment of Errors, *Transcript of Record*, p. 372, fol. 1486; Opinion, *Transcript of Record*, p. 358, fol. 1429.

FOURTH.—As to the sum of $75,000 being liquidated damages, and not a penalty.

"TWENTY-THIRD.—It appears by the record that the Court erred in holding that some effect must be given to the clause declaring that $75,000 shall be considered and taken as the value of the yacht because the sum of $75,000 was not inserted in the agreement of suretyship as liquidated damages but was inserted as a penalty."

Assignment of Errors, *Transcript of Record*, p. 371, fol. 1482; Opinion, *Transcript of Record*, p. 356, fol. 4121.

"TWENTY-FOURTH.—It appears by the record that the Court erred in holding that the value fixed, namely, $75,000, should be taken as the agreed value of the yacht at the beginning of the charter."

Assignment of Errors, *Transcript of Record*, p. 371, fol. 1483; Opinion, *Transcript of Record*, p. 356, fol. 1423.

FIFTH.—In not limiting the liability of the respondent to the market value of the yacht.

"TWENTY-SEVENTH.—It appears by the record that the Court erred in not granting to the defendant before final judgment an

opportunity to show that the fair market value of the yacht *Kanapaha* was far less than $65,000 or $75,000."

Assignment of Errors, *Transcript of Record*, pp. 371, 372, fols. 1484, 1485.

"FIFTEENTH.—It appears by the record that the Court, in view of its express declaration that all evidence of value was reserved for a future hearing, erred in giving the respondent no opportunity to prove the value of the yacht *Kanapaha* or to prove that it had been grossly over-valued in the alleged charter-party. This is shown by the following portions of the record:

When Mr. Bartlett objected to a question propounded to Mr. Frank B. Jones offered as an expert on the value of yachts, the question being: 'Will you state whether there is any market value for steam yachts?' The Court said: 'I sustain the objection, but all questions on damages are reserved; without prejudice to either party, the evidence is for the present excluded.'"

On page 241 of the Transcript of Record Mr. Hughes said:

"MR. HUGHES: We ask for the purpose of this record that the testimony of Capt. Atkinson as to the valuation of the yacht *Kanapaha*, and as to the value of other yachts, between pages 70 and 80 of his deposition be stricken out; save only the statement of Capt. Atkinson that a yacht has no market value.

THE COURT: I shall strike out nothing from the deposition. I will note that on this hearing, no evidence as to damages will be considered; that all such evidence is to be reserved for hereafter.

MR. HUGHES: We do not ask that it be stricken out of the deposition but that it be stricken out from this record, the deposition being in one aspect of the case entirely before your Honor.

THE COURT: I rule that all the evidence in Capt. Atkinson's deposition relating to dam-

ages is not considered as received upon this present hearing, but that that evidence and all other evidence on damage is reserved for future consideration in case any decree should be found for the libellant.

MR. BARTLETT: Evidence as to the condition of the yacht; all that stands, of course?

THE COURT: Do you mean her seaworthy condition?

MR. BARTLETT: Her general condition, yes.

THE COURT: No evidence on the question of damages is considered at this time.

MR. HUGHES: We understand that that includes the evidence as to the value of the yacht?

THE COURT: Of course."

Assignment of Errors. *Transcript of Record*, p. 367, fols. 1471, 1472. See *testimony of Frank Bowne Jones*, *Transcript of Record*, p. 243, fol. 969; p. 245, fol. 978. See also *Transcript of Record*, pp. 281, 282; fols. 1122–1125.

"SIXTEENTH.—It appears by the record that the Court erred in not considering and in not giving any force and effect to the evidence of Captain Stephen B. Atkinson that the yacht *Kanapaha* would not have sold in September, 1898, or any time in the summer of 1898, prior to the accident, for $30,009."

Assignment of Errors. *Transcript of Record*, p. 369, fols. 1475–1476. See *Deposition of Stephen B. Atkinson*, *Transcript of Record*, p. 147, fol. 586.

"SEVENTEENTH.—It appears by the record that the Court erred in not considering and in not giving any force and effect to the statement of Captain Stephen B. Atkinson that the yacht *Kanapaha* in 1898 was a boat eighteen years of age, and that the said yacht had no new engines, no new saloons, and no new tubes, and had nothing new about her excepting the boilers.

And that the said yacht had a low rate of speed, about eleven or twelve knots, and a large consumption of coal, and that she had no electric light plant, and no ice plant, such as modern steam yachts always have."

Assignment of Errors, *Transcript of Record*, pp. 369-370, fols. 1476-1478.
Deposition of Captain Atkinson, *Transcript of Record*, p. 144, fols. 574; p. 143, fol. 571; p. 142, fol. 567.

SIXTH.—As to the extent of the alleged ratification.

"TWENTY-EIGHTH.—It appears by the record that the Court erred in not holding that even if there was a ratification by the defendant's trustees of the hiring of the yacht, there was no ratification by said trustees of the alleged valuation of the yacht at the sum of $75,000."

Assignment of Errors, *Transcript of Record*, p. 372, fol. 1485.

SEVENTH.—In not rendering judgment for the respondent.

"THIRTIETH.—It appears by the record that the Court erred in not rendering judgment for the defendant, dismissing the libel with costs."

Assignment of Errors, *Transcript of Record*, p. 372, fol. 1486.

Upon the grounds above stated, it is asked that the writ of *certiorari* may issue.

All of which is respectfully submitted.

JAMES RUSSELL SOLEY,
FRANKLIN BARTLETT,
Of Counsel for Petitioner.

No. 49.

Brf. of Soley & Bartlett for Pet'r

Office Supreme Court U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 49.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Petitioner,

against

WILLIAM L. MOORE.

BRIEF FOR THE SUN PRINTING AND PUBLISHING ASSOCIATION, PETITIONER.

JAMES RUSSELL SOLEY,
FRANKLIN BARTLETT,
Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 49.

THE SUN PRINTING AND PUBLISHING ASSOCIATION,
Petitioner,

vs.

WILLIAM L. MOORE.

BRIEF FOR THE SUN PRINTING AND PUBLISHING ASSOCIATION.

Statement of Facts.

(References to the Transcript of Record are to the original or side pagings.)

This case comes before this Court on a writ of *certiorari*, granted upon the petition of the Sun Printing and Publishing Association, filed April 30, 1900, requiring the United States Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination, the case of William L. Moore, Libellant-Appellant, vs. The Sun Printing and Publishing Association, Respondent-Appellant.

The case is a libel *in personam* in Admiralty, filed in the District Court of the United States for the South-

ern District of New York by William L. Moore, as owner of the steam yacht "Kanapaha," to recover the sum of $75,000, with interest from October 1, 1898, from The Sun Printing and Publishing Association, the petitioner herein. The libel alleges, in substance, that the said yacht was chartered by the petitioner from the libellant under a certain written agreement designated a "charter party," and that the respondent or petitioner "has failed and neglected to surrender and deliver said yacht to this libellant or his agent, as provided in said charter party, and in that said yacht, while in the charge and control of said respondent, its agents or servants, as aforesaid, was wrecked and is a total loss" (Libel, Par. 12th, Trans. of Rec., p. 7).

The cause was tried in the United States District Court for the Southern District of New York before Judge ADDISON BROWN on April 14, 1898. The final decree gave the libellant judgment in the sum of $65,000, with interest thereon from October 1, 1898.

From this final decree and judgment the respondent appealed to the United States Circuit Court of Appeals for the Second Circuit. The libellant also appealed from the decree on the ground that the damages awarded were insufficient.

The Circuit Court of Appeals, April 17, 1900, modified the decree, by adding $10,000 to the sum already found against the respondent, and remanded the cause to the District Court to enter a decree for the libellant accordingly.

Thereafter, on the petition of the respondent-appellant, a writ of *certiorari* of this Court was issued, dated May 15, 1900, directing that the cause and the record and proceedings therein be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, and in compliance therewith the cause is now before this Court.

The "Kanapaha" was an old steam yacht. She was built in 1880, 18 years before she was lost. During this period of 18 years no substantial repairs appear to have been made to the vessel, with the exception of renewing her boilers. She was therefore an antiquated vessel, built before the modern improvements in yacht building, and she was destitute of such improvements. She had no electric-lighting plant, no ice plant or refrigerating plant, both of which are essential features of modern yachts of her size. She had no new fittings of any kind. Everything about her, except her boilers, was old. Her speed was low, about 11 or 12 knots an hour, while her consumption of coal was large, as might be expected from the date at which her engines were built. In short, she was an old boat, and that of an old-fashioned type. She was a small vessel of her type, her tonnage being only 125 tons net. It can be shown that her original cost at Cramps' was $59,000, and that she was sold four years later for $50,000. But these facts as to original cost are unnecessary, because it was proved by uncontradicted evidence that her value in the summer of 1898 was not more than $30,000. Further evidence as to value might have been introduced, but the Court refused to consider it.

Testimony of Stephen B. Atkinson, Master, Transcript, pp. 142–147; Ruling of Court, p. 281.

In March, 1898, an agreement, or so-called charter party, was made between Chester S. Lord, the managing editor of the "Sun," one of the newspapers published by the defendant corporation, and Thomas Manning, the agent for William L. Moore, the owner of the yacht "Kanapaha," and the libellant in this action, by which it was agreed, in substance, that Mr. Lord should hire the yacht for two months from April 1, for the sum of $5,000. The stipulated price was duly paid, and the yacht was turned over to Mr. Lord. Before the expiration of the term for which the yacht was hired, a new agreement was entered into by the

same parties, on the 14th day of May, 1898, for a further letting of the yacht for the term of four months from June 1 to October 1, 1898, for the sum of $10,000. The terms of this agreement, except as to the period of hiring and as to compensation, were identical with the first.

In connection with the second agreement, an instrument in the nature of an agreement of suretyship was executed by the said Chester S. Lord, and it is upon these two agreements that the present action was brought. The second alleged charter-party is printed in the transcript as Libellant's Exhibit 4, page 334, and is as follows :

> " MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore, of the City of New York, by Thomas Manning, his agent, party of the first part, hereinafter called the owner, and Chester S. Lord, of the City of New York, party of the second part, hereinafter called the hirer, witnesseth :
>
> " That the said William L. Moore, being the owner of the steam yacht 'Kanapaha,' enrolled in the Atlantic Yacht Club, agrees to let and does hereby let, and the hirer agrees to hire and does hereby hire, the said yacht as she is now for the term of four months, from the first day of June, expiring on the first day of October now next ensuing, for the sum of ten thousand dollars ($10,000), payable on the signing of this agreement.
>
> " That the hirer will carry out the provisions of the charter-party made on the first day of April last, and, will, until the expiration of this contract, keep said yacht in repair and will pay all its running expenses, including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light-house and port dues and any and all other dues and charges and will surrender said yacht with all its gear, furniture and

tackle at the expiration of this contract, to the owner or his agent, at Manning's basin, foot Twenty-sixth street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted and free and clear of any and all indebtedness, liens or charges of any kind or of any description.

"That the hirer will use the said steam yacht as a yacht only and will under no circumstances use her to carry freight, merchandise or passengers for hire, nor do anything in contravention of its status as a yacht, nor in the sailing or navigating of the same do anything in contravention of the laws of the United States or of any foreign country.

"That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000) and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.

"That in the event of the failure of the hirer to return and surrender the said yacht to the owner as hereinbefore provided, the hirer shall be charged demurrage and shall pay demurrage to the owner at the rate of five hundred dollars ($500) per day for each and every day's detention.

"The hirer shall be liable and resposible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like.

"That the hirer during the continuance of this agreement shall at all times, and at his own cost and expense, keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"THOMAS MANNING.
Agent for William L. Moore.
"CHESTER S. LORD,
"For the Sun Printing and
Publishing Association."

The accompanying agreement of suretyship (Libellant's Exhibit 5, Transcript, p. 335) reads:

"WHEREAS, by agreement or charter-party dated May 14th, 1898, William L. Moore, of the City of New York, hereinafter called the owner, did or is about to hire or charter unto Chester S. Lord, of the City of New York, hereinafter called the hirer, the steam yacht 'Kanapaha,' enrolled in the Atlantic Yacht Club, as will more fully and at large appear by a copy of said agreement or charter party hereunto annexed and hereby made part hereof:

"Now, at the request of the said hirer, and for valuable consideration received from him, and in consideration of one dollar ($1.00) from the said owner received, and receipt whereof is hereby acknowledged,

"We, the Sun Printing and Publishing Company, of the City of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

"FIRST. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed.

"SECOND. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer, and expressly waive any

and all notice of non-performance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

"In witness whereof, we have hereunto set our our hands this 14th day of May, 1898.

"THIRD. That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars ($75,000).

"CHESTER S. LORD,
"For Sun Printing and Publishing
"Association.

"STATE OF NEW YORK, }
"County of New York, } ss.:

"On this 14th day of May, 1898, before me personally appeared Chester S. Lord, to me known, and known to me to be the Managing Editor of The Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed.

"A. H. BRADLEY,
[SEAL.] "Notary Public,
"New York."

It will be noticed that the above instruments are inartificially drawn, and are, in some respects, contradictory.

Subsequent to the execution of the two instruments, and on May 16, 1898, the sum stipulated to be paid for the hire of the yacht—to wit, $10,000—was paid.

"The charter hire of $10,000, as the evidence shows, was paid by *The Sun's* check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16."
Opinion of Judge Brown, Transcript p. 355.

The respondent-appellant, The Sun Printing and Publishing Association, is a corporation engaged in the business of publishing two newspapers. Its governing body at this time was a Board of Trustees composed of four persons—Paul Dana, the president; Thomas Hitchcock, the secretary; William M. Laffan, the general manager, and Franklin Bartlett. Neither as a board nor individually did any of these persons take any part in the making or execution of these agreements. The record fails to show any knowledge on their part of the execution of such agreements. It fails to show any authority in the managing editor of the newspaper to make such agreements. It fails to show any act of ratification, formal or informal, on the part of such Board of Trustees of the particular terms of the agreements. It shows that the stipulated sum of money for the hire of the boat was paid out of the funds of the corporation; that the employees of the corporation had the use of the boat, and that the corporation paid its running expenses as well as some insurance premiums. Beyond this the record shows nothing. The numerous and onerous stipulations contained in the instrument signed by Mr. Lord, the managing editor, were absolutely unknown to the corporation, and, of course, were not acted upon.

The yacht went ashore on the night of September 5, 1898, near the coast of Cuba, on a reef not shown on the latest United States charts issued prior to her sailing, with which the vessel had been furnished. She became a total loss, and the covenant in said charter party for her redelivery at the expiration of the term thereby became impossible of fulfillment. The term for which she was hired expired October 1, 1898. There was, at the time of her loss, no insurance upon the vessel.

The immediate cause of the stranding of the vessel was the extinguishing by the Spanish authorities of two conspicuous and important lights at the entrance of the harbor of Nuevitas, which formed the ordinary

and indispensable guide to navigation at night in these waters. These lighthouses are thus described in the official publication of the Hydrographic Office:

"The lighthouse on Maternillos point is 170 feet high, white, with the word 'Colon' painted on it, and exhibits 174 feet above the sea a fixed and flashing white light every 48 seconds; duration of flash 5 seconds; light should be visible 17 miles."

The other extinguished light, called the Eastern Point Light, situated on Barlovento or Pilot Point, is thus described:

> "On Barlovento or Pilot Point, the East side of the entrance, is a quadrangular building painted yellow, and a white mast stands in the middle of it, from which is exhibited, 48 feet above the sea, a white light, visible nine miles."

The said official publications also contain the following statement:

> "The entrance of the harbor may be recognized by the Maternillos lighthouse, by three small hills on the south side of the harbor and by three islets in the harbor, called Los Ballenatos, a little higher than the surrounding land. Also, on the east side of the entrance is a quadrangular building, painted yellow, surmounted by a white mast, from which is shown a light."
>
> Libellant's Exhibit 21, p. 345.

The master testified (p. 134):

> "I had been informed that the lights on the North side of Cuba had been relit, and were burning," and that "the stranding would have been avoided if the light had been burning."
>
> Transcript, pp. 133–6.

The above evidence, showing that the loss of the yacht was caused by no want of skill in

navigation, and by no fault on the part of the vessel, was evidently not considered by the trial Court in making its decision, the defendant being held liable regardless of any question of care used in the navigation of the vessel.

Upon the trial the Court expressly refused to consider any and all evidence as to the value of the yacht, and as to the amount of the loss and damage which the libellant had sustained by reason of her destruction. The Court said in reference to a motion to strike out evidence from the deposition of Capt. Atkinson upon the subject of the value of the vessel:

> "I shall strike out nothing from the deposition; I will note that on this hearing no evidence as to damages will be considered, and that all such evidence is to be reserved for hereafter.
>
> * * * * *
>
> "I rule that all the evidence in Capt. Atkinson's deposition relating to damages *is not considered as received upon this present hearing*, but that evidence and all other evidence of damage is reserved for future consideration, in case any decree should be found for the libellant."
>
> Transcript, p. 281.

And again the Court said (Transcript, p. 282):

> "No evidence on the question of damages is considered at this time."
>
> "MR. HUGHES: We understand that that includes the evidence as to the value of the yacht.
>
> "THE COURT: Of course."

No further opportunity was given to introduce evidence on the subject of value, and it is evident from the opinion of the trial Court (Transcript, p. 349) that such evidence was not considered.

It appears from the opinion (Transcript, pp. 354–357) that the amount of damage was arrived at by taking the figure $75,000, named in the charter party, and deducting therefrom the sum of $10,000, which was the amount of the charter hire. The Court expressly states in reference to the $75,000 clause:

> "This means, I think, the value [of the yacht] at the beginning of the charter party" (Transcript, p. 356).

By the final decree it was

> "Ordered, adjudged and decreed, that the libelant recover from the respondent the sum of sixty-five thousand dollars ($65,000), with interest thereon from October 1, 1898, amounting to three thousand four hundred and eighty-eight $\frac{34}{100}$ dollars ($3,488.34), together with the sum of one hundred and forty-one $\frac{03}{100}$ dollars ($141.03) for his costs and disbursements as adjusted, amounting in all to the sum of sixty-eight thousand six hundred and twenty-nine $\frac{37}{100}$ dollars ($68,629.37)."
>
> *Transcript*, pp. 358, 359.

It appears from the opinion (*Transcript*, pp. 354–357) that the amount of the damage was arrived at by taking the figure $75,000 named in the old charter party, and deducting therefrom the sum of $10,000, which was the amount of the charter hire. The Court expressly states in reference to the $75,000 clause: "This means, I think, the value [of the yacht] at the beginning of the charter period."

Transcript, p. 356.

The evidence, therefore, as to the actual value, and consequently as to the actual loss, was entirely rejected, and the determination of the damages was arrived at by taking the figure named in the instrument as a starting point.

It is contended on the part of the petitioner that, assuming the two agreements to be binding upon it, they constituted an agreement only to secure the loss and damage " which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of the contract " —in other words, an agreement to pay *actual* loss or damage to the boat and *actual* loss or damage to the owner from non-performance of covenants ; that the sum of $75,000 mentioned therein must be regarded as in the nature of a penalty and not of liquidated damages ; and that by reason of these facts, assuming that a liability existed at all, it should be measured by the actual loss, or in case of the destruction of the vessel and failure to return it, by the *actual value* of the vessel.

The effect of any other interpretation is to make this respondent pay either $75,000, or, according to the trial Court, $65,000, for the loss of a boat eighteen years old, whose value, according to the rejected evidence, was stated to be $30,000—in other words, to pay from thirty-five to forty-five thousand dollars more than her value. Such an injustice resulting from an incorrect enunciation of the law, calls for reversal by the highest tribunal, not only from the importance of the principle which the Court has disregarded, but from the excessive hardship of the result and the magnitude of the sum which the respondent is called upon to pay.

On the question of the ratification by the defendant of the acts of Lord, Judge BROWN held that the circumstances " leave no doubt of the ratification by the defendant of Mr. Lord's acts, equivalent to an original authority."

Transcript, p. 354.

It is contended by your petitioner that the only ratification, if any, which can be predicated on the

act of the defendant, extended to the mere user of the vessel, and that assuming that the amount named, $75,000, is to be regarded as liquidated damages, there was no ratification of this and other oppressive terms of Lord's contracts, as there can be no ratification without knowledge.

Upon both the above points, the Circuit Court of Appeals held with the trial Judge as appears from the opinion.

Transcript, pp. 377–384.

Upon the argument before the Appellate Court it was "insisted for the charterer that the yacht perished without any fault on the part of those who were navigating her, and consequently that the case is one for the application of the principle well settled in the law of bailments, that the hirer is absolved from further obligation where the hired thing is destroyed without his fault, so that redelivery to the bailor is impossible," and the case of *Young vs. Leary* (135 N. Y., 569) was relied on in support of this contention. The Appellate Court, as appears by its opinion, admitted that such was the effect of the case cited, but overruled it on the authority of certain Massachussetts cases (Opinion, p. 5), and decided that the hirer was liable notwithstanding the destruction of the vessel and the consequent impossibility of its redelivery.

Upon the question whether the amount named in the instrument, namely, $75,000, should be considered as liquidated damages or as a penalty, the Court entirely disregarded the principle, repeatedly approved by the highest State courts and by the Circuit Courts of Appeals, as well as by many English decisions, that even though a sum is expressly stated in a contract to be liquidated damages, the Courts will disregard such a statement where the amount named is disproportionate to the presumable or probable loss, and will hold that the intention of the parties, notwithstanding the express language used, was to make the sum named a penalty.

The Court further held, apparently as matter of law, that it is impossible to ascertain the value of a yacht, stating that the Court " may take judicial notice that the market value of yachts is a very uncertain quantity " (*Opinion*, p. 6).

Finally, upon the question decided by the trial Court that assuming $75,000 to be the limit of liability, this amount should be reduced by the hire of the yacht—namely, $10,000—already paid by the defendant, the Appellate Court overruled the District Court by fixing the amount of the judgment at $75,000, compelling the charterer to pay altogether the sum of $85,000, when its liability had been expressly limited to $75,000 by the agreement upon which this action was brought.

It appears from the opinion (*Transcript*, pp. 355–357) that the Court below based its determination of the amount of the judgment upon the fact that the sum of $75,000 named in the two instruments was a " security or guarantee to the owner in the sum of $75,000 against any and all loss and damage which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms or conditions of this contract."

One of these terms or conditions was the covenant to pay the hire of the yacht—namely, $10,000—which sum was actually paid by the respondent, subsequent to the execution of the agreements, by which payment, in the language of the trial Judge, " so much of its obligation of $75,000 has, therefore, been discharged by 'The Sun' " (*Transcript*, p. 355). The opinion also refers to " the express provision of the second instrument, called the agreement of suretyship," " that in no case shall the liability of 'The Sun' exceed the sum of $75,000," and says: " Even if the two agreements be regarded as virtually one, as it would seem they must be, still this latter clause must control the general expressions preceding; and this leaves, after

"The Sun's" payment of $10,000 for the charter hire, but $65,000 principal as the limit of any further obligation on its part."

Transcript, p. 355.

It is contended on the part of the petitioner that, assuming the agreement of suretyship to be binding upon it, and that the sum of $75,000 is to be regarded as liquidated damages, both of which are denied, yet the trial Court was right in reducing the amount by $10,000, which the respondent had already paid in fulfillment of the liability covered by its bond; that the total liability of the respondent could not exceed the sum of $75,000; that by reason of these facts, assuming that a liability existed at all, in measuring which the evidence of actual loss, or in other words, of the actual value of the vessel was to be disregarded—assuming, in short, that every other point was decided against *The Sun*,—its liability could in no case exceed the sum of $75,000, and that any payment made by the respondent in satisfaction of its liability to the libellant, under the charter-party and the contract of suretyship, was to that extent a discharge of its entire obligation, which was in no case to exceed the sum of $75,000; and finally, that the trial Court was, therefore, correct in deducting from the total liability the sum of $10,000, which was the amount paid for the hire of the vessel.

The contention of the petitioner may be as summarized as follows:

FIRST. That if the petitioner is liable in any amount for the failure to re-deliver the vessel to her owners, or for her loss and destruction, he is liable to the libellant only for the fair market value of the yacht at the time of its destruction, and that the sum of seventy-five thousand dollars ($75,000) mentioned in the charter-party and in the agreement of suretyship, is to be regarded as a penalty, and not as liquidated damages.

SECOND. That as the charter-party herein provided for the delivery of the vessel at the port of New York in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, the destruction of the yacht or the thing to be re-delivered, without the petitioner's fault, pending the continuance of the contract, relieved the petitioner from the obligation.

THIRD. That the charter-party and agreement of suretyship were never authorized or ratified by the defendant corporation, and that all that was ratified was the hiring or user of the yacht, and not the extraordinary and oppressive provisions of the instruments as to which the minds of the libellant and the defendant corporation never met.

FOURTH. That in any case the liability of the defendant under the two instruments in question was expressly limited to $75,000, and if its liability should be found to equal this amount, the judgment herein should be reduced by the sum of $10,000 already paid under the charter-party.

The following assignments of error are relied on by the petitioner in the review of this case:

FIRST. As to the measure of damages for the loss or non-delivery of the vessel in case any damages are allowed.

As to this point, the trial Court refused to take into consideration any evidence of the actual value of the vessel, declaring that such evidence was reserved for future consideration in case any decree should be found for the libellant, and thereupon proceeded to make a decree for the libellant based upon the alleged valuation in the charter party without reference to the question of actual value. In other words, both the trial Court and the Appellate Court considered the sum of

$75,000 named in the agreements as liquidated damages, and not as a penalty. In reference to this point, attention is called to the following assignments of error:

"TWENTY-THIRD. It appears by the record that Court erred in holding that some effect must be given to the clause declaring that $75,000 shall be considered and taken as the value of the yacht, because the sum of $75,000 was not inserted in the agreement of suretyship as liquited damages, but was inserted as a penalty."

Transcript, p. 371; Opinion, *Transcript*, p. 356.

"TWENTY-FOURTH. It appears by the record that the Court erred in holding that the value fixed —namely, $75,000—should be taken as the agreed value of the yacht at the beginning of the charter."

Transcript, p. 371; Opinion, *Transcript*, p. 356.

"TWENTY-SEVENTH. It appears by the record that the Court erred in not granting to the defendant before final judgment an opportunity to show that the fair market value of the yacht "Kanapaha" was far less than $65,000 or $75,000."

Transcript, pp. 371, 372.

"FIFTEENTH. It appears by the record that the Court, in view of its express declaration that all evidence of value was reserved for a future hearing, erred in giving the respondent no opportunity to prove the value of the yacht "Kanapaha," or to prove that it had been grossly overvalued in the alleged charter party. This is shown by the following portions of the record:

"When Mr. Bartlett objected to a question propounded to Mr. Frank B. Jones, offered as an expert on the value of yachts—the question being: 'Will you state whether there is any market value

for steam yachts?'—the Court said: 'I sustain the objection, but all questions on damages are reserved; without prejudice to either party, the evidence is for the present excluded.'"

On page 241 of the Transcript Mr. Hughes said:

"MR. HUGHES: We ask for the purpose of this record that the testimony of Capt. Atkinson as to the valuation of the yacht "Kanapaha," and as to the value of other yachts, between pages 70 and 80 of his deposition be stricken out, save only the statement of Capt. Atkinson that a yacht has no market value.

"THE COURT: I shall strike out nothing from the deposition. I will note that, on this hearing, no evidence as to damages will be considered; that all such evidence is to be reserved for hereafter.

"MR. HUGHES: We do not ask that it be stricken out of the deposition, but that it be stricken out from this record, the deposition being in one aspect of the case entirely before your Honor.

"THE COURT: I rule that all the evidence in Capt. Atkinson's deposition relating to damages is not considered as received upon this present hearing, but that that evidence, and all other evidence on damage, is reserved for future consideration in case any decree should be found for the libellant.

"MR. BARTLETT: Evidence as to the condition of the yacht, all that stands, of course?

"THE COURT: Do you mean her seaworthy condition.

"MR. BARTLETT: Her general condition, yes.

"THE COURT: No evidence on the question of damages is considered at this time.

"MR. HUGHES: We understand that that includes the evidence as to the value of the yacht?

"THE COURT: Of course."

Transcript, p. 367; *Testimony of Frank Bowne Jones, Transcript*, pp. 243, 245; see, also, *Transcript*, pp. 281, 287.

"SIXTEENTH. It appears by the record that the Court erred in not considering and in not giving any force and effect to the evidence of Captain Stephen B. Atkinson that the yacht "Kanapaha" would not have sold in September, 1898, or at any time in the summer of 1898, prior to the accident, for $30,000."

Transcript, p. 369; *Deposition of Stephen B. Atkinson, Transcript*, p. 147.

"SEVENTEENTH. It appears by the record that the Court erred in not considering in not giving any force and effect to the statement of Captain Stephen B. Atkinson that the yacht "Kanapaha" in 1898 was a boat eighteen years of age, and that the said yacht had no new engines, no new saloons, and no new tubes, and had nothing new about her excepting the boilers.

"And that the said yacht had a low rate of speed, about eleven or twelve knots, and a large consumption of coal, and that she had no electric light plant and no ice plant, such as modern steam yachts always have."

Transcript, pp. 369, 370.
Deposition of Captain Atkinson, *Transcript*, pp. 142–144.

SECOND. The Court rejected the well-established principle that where an agreement provides for redelivery of the thing hired in good condition, the destruction of the thing to be delivered without the hirer's fault relieves him from the obligation.

In reference to this point reference is made to the following assignments of error:

"TWENTY-FIRST. It appears by the record that the Court erred in holding that the yacht having been a total loss, the defendant under the agreement in the charter 'to be liable and responsible for any and all loss and damage' as well as by the agreement to surrender the yacht 'in as good condition as at the start fair wear and tear from reasonable and proper use only excepted' as well as under the agreement of suretyship so called engaging that the hirer should 'well and faithfully perform and fulfill ever ything in and by said agreement on his part to be kept and performed' became liable to the libellant for his loss and damage through its failure to return the yacht on the first of October when the charter expired."

Transcript, pp. 370, 371; Opinion, *Transcript*, p. 354.

"TWENTY-NINTH. It appears by the record that the Court erred in granting a decree to the libellant for $65,000 with interest and costs."

Transcript, p. 372; Opinion, *Transcript*, p. 358.

THIRD. The petitioner never authorized or ratified the provisions of the instruments, except as to the hiring or user of the yacht. Upon this point reference is made to the following assignments of error:

"EIGHTEENTH. It appears by the record that the Court erred in holding that the alleged contracts, the charter parties or charters executed by Chester S. Lord, the Managing Editor of 'The Sun,' were legally the contracts of 'The Sun' the defendant."

Transcript, p. 370; Opinion, p. 352.

"NINETEENTH. It appears by the record that the Court erred in holding that Chester S. Lord had

such general authority as was sufficient to enable him to enter into these contracts or charters."

Transcript, p. 352.

"TWENTIETH. It appears by the record that the Court erred in holding that the Trustees and managing officers of the defendant had such general knowledge of his [Lord's] acts in hiring the yacht, and such perfect means of knowledge of all the particulars had they desired to know them, as to make their acts in using the yacht under the charters as they did a ratification of Mr. Lord's actions, and to bind them for the performance of his agreements made in their behalf."

Transcript, p. 370; Opinion, *Transcript*, pp. 352, 353.

"TWENTY-EIGHTH. It appears by the record that the Court erred in not holding that, even if there was a ratification by the defendant's trustees of the hiring of the yacht, there was no ratification by said trustees of the alleged valuation of the yacht at the sum of $75,000."

Transcript, p. 372.

FOURTH. Assuming that the views of the Trial Court are sustained as to the liability of the petitioner in the sum of $65,000, the Court of Appeals erred in increasing this amount by $10,000.

Opinion, Transcript, p. 383.

ARGUMENT.

Point I.

The Circuit Court of Appeals committed a fatal error in holding that the sum named in the two contracts—to wit, $75,000—was to be regarded not as a penalty but as liquidated damages; that for that reason judgment must be given for that amount, and that evidence of actual value, and, therefore, actual loss or damage, was not to be considered.

The provisions of the contract and bond which relate to this question, and upon which alone the opinion of the Circuit Court of Appeals is based, are as follows:

(1) Of the contract:

> "That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of $75,000, and the said hirer shall procure security or guaranty to and for the owner in the sum of $75,000 *to secure* any and all losses and damages which may occur to said boat, or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract."

(2) Of the bond:

> "FIRST. That the said hirer will well and faithfully perform and fulfill everything in and by the said annexed agreement on his part to be kept and performed. * * *
>
> "THIRD. That our liability hereunto shall in no case exceed the sum of $75,000.

It will be observed that the two agreements are inartificially drawn; that their provisions are in

some respects obscure, and in others contradictory; that while it was apparently contemplated in the alleged charter-party that the so-called agreement of suretyship or guarantee should be executed by a party other than the party to the first agreement, it was in fact executed by the same individual, under the same designation; and they must, as the trial Court stated, be read together, so far as they can be.

Under these circumstances, and especially in view of the laxity in the construction of the agreements, the principle that courts of law must apply in construing a stipulation for liquidated damages as a penalty finds an additional justification.

Assuming that these instruments create any liability in this respondent, it is a liability upon a *quasi* agreement of indemnity, for actual loss and damage which may be sustained by the owner by reason of loss or damage to the boat and its belongings, and by reason of the breach of any of the terms of the contract. In such a case the sum named in the bond is regarded simply as a penalty, to which the total liability, ascertained from evidence of actual loss, is restricted.

In so far the bond is concerned, the sum mentioned is purely a penalty and can be regarded in no other light. The agreement is that the hirer shall faithfully perform all the covenants of the principal agreement, and that the liability of the surety shall be a sum which "shall in no case exceed the sum of $75,000." It does not say that the liability of the surety for any and all breaches, or even for any particular breach, shall amount to $75,000, but only that it shall not in any case exceed that amount. It is therefore in terms a penalty or a limitation of total liability to the amount named.

As to the provision in the principal contract that "for the purpose of this charter the value shall be $75,000," this can only relate to damages in case of a total loss for which, under the contract, the charterer might become liable. This is the only aspect in which

the vessel can have a value "for the purpose of this charter." There are no other conceivable conditions in which the question of a value "for the purpose of this charter" could arise. The provision, therefore, is equivalent to a provision for damages in case of a total loss of the vessel for which under the terms of the instrument the charterer may be held liable, or in case of the failure to return her under circumstances which render the charterer liable under the terms of the instrument. It is merely an ordinary provision in reference to damages in another form. Whatever it means, it certainly can be held to mean no more than this.

Assuming for the sake of the argument on this point, that the vessel was a total loss or was not returned to her owners, under such circumstances that the owner was liable for non-performance of the terms of the contract, and that the provision is intended as a stipulation for damages, we have to consider whether such a provision will in law be held to devolve upon the charterer a liability for the sum named independently of the actual value of the vessel or the actual amount of the damage, or whether the sum named is to be regarded as a penalty, and the damages are to be ascertained by proof of actual loss.

It was contended by the libellant that this was a valued policy of insurance; but this contention was itself rejected by Judge BROWN at the trial who said (*Transcript*, p. 357):

> "The valuation clause in marine policies of insurance is not analagous, I think, to this charter In such policies that clause has reference to a single object, namely, the rights of the parties upon a loss by sea peril. In this charter its object was to determine also the amount of security, which was designed to cover and does cover a multitude of particulars, as well as the important obligation to pay the charter hire."

The trial Judge is evidently correct in this statement. *This is not a valued policy of marine insurance.* It is really an agreement of indemnity to secure the performance of certain covenants, limited in amount to $75,000, with a disguised stipulation for liquidated damages in case of failure to redeliver.

The alleged charter-party provides that the hirer shall procure security in the sum of $75,000, against what?

FIRST.—To secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner,

(a) by reason of such loss or damage, and

(b) by reason of the breach of any of the terms or conditions of this contract.

This language certainly describes an ordinary agreement of suretyship with the sum of $75,000 as the penalty. The language could hardly be more explicit in confining the liability to actual loss and damage. It is to secure "any and all losses and damages *which may occur* to said boat," that is to say, actual losses and damages. It is "to secure any and all losses and damages which may be sustained by the owner by reason of such loss or damage." Here, again, it is actual loss and damage that is referred to.

Again, when reference is made to a breach of the terms and conditions of the contract, what is the bond to secure? It is to secure "any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner * * * by reason of the breach of any of the terms or conditions of this contract." In this case, also, where the loss or damage arises from breach of the terms of the contract, it is confined to actual loss and damage.

There are numerous covenants in the contract, some of which are contradictory of others, the breach of all

of which is covered by this security. Thus, there are the covenants (1) to pay rental; (2) to keep in repair; (3) to pay running expenses; (4) to surrender in good condition, wear and tear excepted; (5) to use only as a yacht; (6) to conform to the navigation laws; (7) to pay demurrage; (8) to be responsible for any and all loss and damage. The security of $75,000 was given for the performance of any or all of these covenants, and, as above shown, the actual loss and damage which may result to the owner from a breach. This language makes the amount of $75,000 an ordinary penal sum or penalty, and so far contradicts the idea of liquidated damages.

Both the trial Court and the Court of Appeals held that the damages for a total loss were fixed and determined by the sum stipulated in the greement as the value of the yacht. The question of actual value or actual damage was expressly excluded from consideration. Evidence was offered upon this point, but the trial Court refused to consider it (see Fifteenth, Sixteenth and Seventeenth Assignments of Error).

Judge BROWN stated in substance in his opinion that he used the stipulated sum of $75,000 as the figure to determine the damages, but he held that it was a penal sum, in that it limited the total liability, and should be reduced by the sum of $10,000, which had been already paid for the rental of the yacht. The Appellate Court reversed the decision, in so far that it refused to make the allowance of $10,000, and stood upon the broad ground that the sum named was liquidated damages.

In this way the libellant, under a contract which in substance secured him for loss or damage that he might actually sustain, obtained a judgment for $75,000 for the loss or non-delivery of a vessel which cost only $59,000 when first built, at a time when the cost of shipbuilding was very much higher than it is to-day—a vessel as to which it was proved by the rejected evidence that she was eighteen years

old; that she was only 125 tons net tonnage; that larger and better-equipped steam yachts could be built for $55,000; that no part of her structure or machinery had been renewed during the whole period of eighteen years in which she had been in use except the boilers; that she was lacking in the usual and necessary appliances to be found in modern steam yachts, and that if sold she would not bring more than $30,000. It thus appears that the respondent is required to pay for a boat which he had hired for six months, eighteen years old and of antiquated type—a sum more than double what is proved by uncontradicted evidence to be her actual value.

This conclusion is reached by the learned Court of Appeals expressly on the ground that the parties have stipulated an amount which is to be considered as liquidated damages. The Court would necessarily have reached the same conclusion, under its reasoning, if the amount at which the liquidated damages had been placed had been $500,000 or $1,000,000, for it held that

> "It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is, in the absence of fraud or mutual mistake, conclusive upon them" (Opinion, p. 382).

We contend that the true rule of law as set forth by all the highest authorities is precisely the reverse, and that the naming of a stipulated sum to be paid for the non-performance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that, *if the amount is disproportionate to the loss*, the Court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically stated to be liquidated damages.

I.

IN A CONTRACT INVOLVING A PROVISION FOR THE PAYMENT OF DAMAGES IN CASE OF A BREACH THE SUM NAMED THEREIN, EVEN THOUGH EXPRESSLY STATED TO BE LIQUIDATED DAMAGES, WILL BE HELD TO BE A PENALTY IF THE SUM STIPULATED IS UNREASONABLE OR UNJUST, OR OPPRESSIVE, OR EXTRAVAGANT, OR DISPROPORTIONATE TO THE ACTUAL DAMAGES.

The general principle in reference to the question whether a sum stipulated to be paid for the non-performance of an agreement is to be considered as a penalty or as liquidated damages, is stated thus by Mr. Chief Justice MARSHALL:

> "In general, a sum of money in gross to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages, and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties."
>
> *Tayloe vs. Sandiford*, 7 Wheaton, 13.

> "Nor can Courts enforce this rule without looking freely to the contract, not only as it appears upon its face, but the comparative value of the consideration and the thing to be performed as they did here in the principal case; for, if they confine themselves to the language of the parties, it is so easy to disguise the real case by fair words that the rule becomes nothing. The right to redeem from under the penalty (to be made fully effectual) must be held inherent in the contract, like the equity of redemption in a mortgage, and

not controlled by the express intention of the parties."

Spencer vs. Tilden, 5 Cowen, 151, n.

"Courts have felt embarrassed when called upon to enforce inequitable, harsh or oppressive provisions in contracts, inserted often without reflection or a full knowledge of their legal effect, by a laudable desire to harmonize the abstract principles of right and justice with the established legal rules that parties are at liberty to make contracts for themselves, and that it is the duty of courts to enforce them as made. By a liberal use of the element of supposed intention they have been enabled to do so to a reasonable extent. * * * For the purpose of this case we must regard the provision as a penalty."

Noyes *et al.* vs. Phillips, 60 N. Y., 411.

No better illustration of the application of this principle can be cited than the leading case of Gay Mfg. Co. vs. Camp, 1895, 13 C. C. A., 137, at p. 141, *et seq.*

After a decision in this case by three judges, at the Circuit Court of Appeals for the Fourth Circuit, a petition for a rehearing was considered and denied by the Circuit Court of Appeals at another term, the Court consisting of the Chief Justice of the United States, and GOFF and SIMONTON, JJ. It has, therefore, been concurred in by five judges.

Gay Mfg. Co. vs. Camp, 25 U. S. Appeals, 376.

In this case a lease had been made by the Receivers of the plaintiff to the defendant of certain mill property at a rental of $10,000 per annum. The lease stipulated that in case of a breach by the lessees,

"in lieu of all such claim for loss or damage, the sum of five thousand dollars is now hereby esti-

mated, assessed and accepted between the parties hereto *as liquidated damages* to be paid by the parties of the second part unto the party of the first part which the parties of the second part hereby declare to be due and promise and bind themselves to pay unto said party of the first part or its assigns immediately upon the termination or annulment, or declaration of the termination or annulment, of this contract by the party of the first part."

No language could be more explicit and more emphatic than this. The sum of $5,000 is stated to be "estimated, assessed and accepted between the parties hereto as liquidated damages." Not only that, but it is a sum "which the parties of the second part hereby declare to be due and promise and bind themselves to pay" upon the arising of the condition. The designation of liquidated damages and the express promise to pay the sum named could not be more explicit.

Before the expiration of the term the lessees defaulted in the payment of the rent, and on this default the lessors entered. Subsequently the amount of the rent due, which was about $2,500, was paid. The question arose, as stated by the Court: "Are the lessors entitled to the payment of $5,000 as liquidated damages under these circumstances?" As to this, the Court said:

"This will depend upon the question: Is the sum of $5,000 inserted as a penalty or as liquidated damages? 'Upon this subject,' says DEADY, J., in *Harris vs. Miller*, 6 Sawy., 311; 11 Fed., 118, 'the law is peculiar, *and, instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.*'

"In *Spencer vs. Tilden*, 5 Cow., 150, the Court says: 'This doctrine, *which converts damages ap-*

parently stipulated or fixed by the parties into a penalty, came from the civil law through the Court of Chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, Courts must *disregard the particular expressions of the parties;* if for the moment we agree that a party may, by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specific default, secure the whole to himself without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal.'

"The rule laid down in *Barton vs. Glover*, Holt, N. P., 43, is: 'When a sum of money, whether in the name of a penalty or otherwise, is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed or contract and the penalty as the accessory, and therefore only to secure the damages really incurred.' * * *

"The principle * * * is that the circumstances of each case determine whether the sum stated be liquidated damages or a penalty; and this without regard to the words used, perhaps sometimes in disregard of the intent of the parties, and whenever it appears that the damages occasioned are easily estimated in money, the covenant is construed as a penalty. 'The subject

matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damages would be difficult if not vain, then the courts will incline to give the relief which the parties have agreed to. But if, on the other hand, the contract is such that the strict construction of the phraseology *would work absurdity or oppression*, the use of the term 'liquidated damages' will not prevent the Court from inquiring into the actual injury sustained and doing justice between the parties. *(1 Pomeroy, Eq. Jur.*, Secs. 433, 444*)*. It is quite impossible for any substantial damage to have resulted from the annulling of the lease a few days before the expiration of its term, and the exaction of a penalty of $5,000 as the consequence of such default would be grossly excessive and inequitable. The judgment of the Circuit Court is affirmed, with costs.

Gay Mfg. Co. vs. Camp, 13 C. C. A. 137 (65 F. R., 794).

So entirely is the language of the contract disregarded that in the case of East Moline vs. Weir Plow Co. (decided by the United States Circuit Court of Appeals for the Seventh Circuit, 1899, 37 C. C. A., 62), where the agreement not only expressly stated (p. 65) "that the measure of damages for the default of either party to carry out this agreement shall be $50,000," but each party alleged default on the part of the other and claimed the entire sum—namely, $50,000—as liquidated damages, of course, involving an admission on both sides that such was the true interpretation of the contract. Notwithstanding the express statement in the agreement as to the measure of damages, and notwithstanding the mutual claim and the mutual admission made by both parties that such was the meaning of the contract, the Court, when it found for the de-

fendant on its counter-claim, refused to consider the amount named as anything but a penalty.

Equally clear and forcible is the statement of the principle in the case of *Ward vs. The Hudson River Building Company*, 125 N. Y., 230 (decided in 1891 by the New York Court of Appeals). In this case plaintiff had contracted to build four houses by a certain date, and that he should "pay to the owner ten dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated damages." After the default had continued for a considerable time, a new agreement was made, as follows:

> "It is mutually agreed that the sum, or penalty, due under said contract on March 25, 1888, shall be $1,540 by way of liquidated damages, unless four villas and all extra work are then entirely finished" (p. 233).

and the contract then contained the following furthe agreement:

> "It is further mutually agreed that in case said Ward fails to complete said villas on or before said 25th day of March, 1888, as aforesaid, there shall be due and owing to said Hudson River Building Company, its successors or assigns, the sum of $1,540 by way of liquidated damages, etc." (p. 232):

and there we find the rule laid down by Judge GRAY as follows:

> "Whether the sum agreed between parties to be paid, in the event of a breach of some agreement is termed by them a 'penalty,' or 'liquidated damages,' is not controlling upon the question of construction. Their use of such words is not always conclusive as to their legal meaning. To get at that we must consider the subject matter

and nature of the agreement and understand clearly the intention of the parties. If it shall then appear that the damage and loss which may be presumed to result from non-performence are uncertain and incapable of exact ascertainment, then the payment or liability fixed by them must be deemed to be liquidated damages and recoverable as such. *Where, however, a sum has been stipulated as a payment by the defaulting party, which is disproportionate to the presumable or probable damage or to a readily ascertainable loss, the Courts will treat it as a penalty and will relieve on the principle that the precise sum was not of the essence of the agreement, but was in the nature of a security for performance.*"

The principle is here again distinctly stated that, notwithstanding a sum *has been stipulated as a payment for non-performance by the defaulting party*, if it is disproportionate to the presumable damage or loss, the Courts will treat it as a penalty.

In the present case the Court not only refused to consider the question whether the amount stipulated was disproportionate, but they actually refused to consider any evidence from which the amount of presumable or probable loss could be inferred. They threw out the question of presumable, probable or actual loss altogether, and the libellant was not required to prove actual loss, nor was the respondent allowed to prove it as against the sum named in the contract,

To the same effect says Sedgwick :

"SEC. 396. *General Observations.* * * *

"Whenever questions of the nature we are now considering present themselves, the attention of the courts is mainly fixed on three different points : First, the language employed ; second, the subject matter of the contract ; and, third, the intention of the parties. These are indeed the great ele-

ments of interpretations of all contracts. But in the case we are now examining the courts, especially in this country, have generally shown a marked desire to lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained. *The language of the contract is not controlling.* And such, it seems, was the disposition of the civil law in the somewhat analogous case of the *stipulatio duplex.* * * * But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties (see Noyes vs. Phillips, 60 N. Y., 408)."

Sedgwick on Damages (8th Ed.), Vol. 1, p. 558.

SEC. 407. *The liquidation must be reasonable.* The parties, then, must not only intend that the sum named shall be paid over to the plaintiff upon the breach, the sum must also be reasonable in itself (People vs. C. P. R. R. Co., 76 Cal., 29; Perzell vs. Shook, 53 N. Y. Superior Court, 501; Sleeman vs. Waterous, 23 Up. Can. C. P., 195). In other words, in every case where a fixed sum is stipulated as damages, the Court will look to see whether the stipulated compensation is a reasonable one; and if not, they will require damages to be assessed as if no stipulated sum were named in the contract. In the words of the Supreme Court of Michigan: "Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside" (MARSTON, J., in Meyer vs. Hart, 40 Mich., 517–523).

So firmly is this principle applied that the liquidation provided by a contract may, as the circumstances show to be equitable, in one case be upheld, and in another set aside. Thus in Hahn vs. Horstman, 12 Bush, 249, a case of common building contract, which stipulated damages at the rate of twenty dollars a day for a delay in completing the contract, the defendant left the work unfinished ; and the plaintiff more than a year after the time for completion, brought suit, claiming damages for the whole time at the stipulated rate. If the work had been finished, though a few days after the agreed time, it is well settled, as will be seen, that the stipulated sum could be recovered. In this case, however, to allow recovery at the stipulated rate would be grossly in excess of compensation ; and the Court refused to allow damages at the stipulated rate (Acc. Greer vs. Tweed, 13 Abb. N. S., 427 ; Colwell vs. Foulks, 36 How. Pr., 306). Some courts say that the damages must not be "grossly excessive" (Parr vs. Greenbush, 42 Hun, 232) ; some that they must not be "unjust and oppressive" (Scofield vs. Tompkins, 95, Ill., 190 ; Mueller vs. Kline, 27 Ill., App., 473 ; Higginson vs. Weld, 14 Gray, 165). "Unreasonable" (Hardee vs. Howard, 33 Ga., 533 ; Sutton vs. Howard, 33 Ga., 536 ; Maxwell vs. Allen, 78 Me., 32 ; Daly vs. Maitland, 88 Pa., 384 ; Williams vs. Vance, 9 S. C., 344 ; Schrimpf vs. Tenn. Manuf. Co., 86 Tenn., 219). "Extravagant" (Gammon vs. Howe, 14 Me., 250), or "disproportionate" (Jaqua vs. Heddington, 114 Ind., 309 ; Haymaker vs. Schroers, 49 Mo., 406 ; Staples vs. Parker, 41 Barb. 648). But all seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach (Tholen vs. Duffy, 7 Kas., 405 ; Stearns vs. Bar-

rett, 1 Pick., 443 ; Gowen vs. Saltwarsh, 11 Mo., 271 ; Dennis vs. Cummins, 3 Johns. Cases, 297 ; Burrage vs. Crump, 3 Jones L., 330 ; Pennypacker vs. Jones, 106 Pa., 237 ; Jones vs. Queen, 7 Can., 570). Thus, where a contract of hiring provided that, on the servant leaving without notice, whatever was then due to him should be considered as liquidated damages for the breach of his contract, it was held that the forfeiture would not be enforced by the courts. Since the arrears of wages might be large or small, the principle of compensation was clearly departed from by the parties (Richardson vs. Woehler, 26 Mich., 90 ; Schrimpf vs. Tenn. Manuf. Co., 86 Tenn., 219 ; Jones vs. Queen, 7 Can., 570). But the forfeiture of a fixed reasonable sum would be allowed. (Richardson vs. Woehler, 26 Mich., 90 ; Schrimpf vs. Tenn. Mfg. Co., 86 Tenn., 219 ; acc. Jones vs. Queen, 7 7 Can., 570).

SEC. 408.—*Language not Conclusive ; Rule in Case of Doubt.* It follows from what has been said that the language of the contract is not conclusive. The question whether a stipulated sum is to be allowed as liquidated damages is a question of law, and no agreement of the parties to call it a penalty or liquidated damages can decide the question *(Jaquith vs. Hudson, 5 Mich., 123–136).*

SEC. 410.—*Penal Sum Collateral to Object of Contract.*

Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages. In a contract for the sale of land for $8,000, payable $5,000 on the first of January following, and the rest in three annual installments, a clause stating that, "in further confirmation of the said agree-

ment, the parties bind themselves, each to the other, in the penal sum of $1,000," is not to be considered as liquidated damages for the breach of this agreement, but as a penalty superadded (Robinson vs. Cathcart, 2 Cranch. C. C., 590; acc., Richards vs. Edick, 17 Barb., 260; Law vs. House, 3 Hill [S. C.], 268).

Sedgwick on Damages (8 ed.), Vol 1, p. 583–6.

The disproportionate or oppressive amount of the sum named as liquidated damages has always been taken into consideration by the Court. Says the Court of Appeals in *Coldwell vs. Lawrence*, 38 N. Y., 74:

> " It is scarcely to be suppose that the parties intended to fix an amount so extravagant, and which would be, if allowed as claimed, so grossly disproportionate to the actual damages, as liquidated damages for so trivial an omission or delay, and I cannot discover any sufficient and satisfactory reason for any such inference or conclusion."

In *Peekskill R. R. Co. vs. Peekskill*, 21 App. Div., 94 (October Term, 1897), while the sum named as liquidated damages was held to be such by the Court, one ground of its decision was that " the sum does not seem to be unreasonable in amount or disproportionate to the actual damage which may have been sustained." The Court further says, referring to the various stipulations for damages in breaches of contract:

> " In some of them, although the stipulation in words provided that the sum specified should be regarded as liquidated damages, the Courts construed it as meaning a penalty. But this was done to prevent great injustice being worked and relieve from justice."

The principle is therefore one of active and constant application in the courts to-day.

It will be seen that the New York Court of Appeals, like the United States Circuit Court of Appeals in the Fourth Circuit, disregards the fact that "a sum has been stipulated as a payment by the defaulting party." This fact is overridden not, as in this opinion, merely "by fraud or mutual mistake," but by a totally different consideration—namely, that the amount is disproportionate to the presumable or probable damage.

> "The question whether the sum stipulated is to be paid as a penalty or as liquidated damages * * * depends on a construction of the whole instrument, upon the real intention of the parties as ascertained from all the language they have used, from the nature of the act to be performed, from the consequences which naturally result from a violation of the contract, and from the circumstances generally surrounding the transaction. * * * *It is well settled that if the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty.*"
>
> Vol. I., Pomeroy Equity Jurisprudence (2d Ed.), Sec. 440, *citing* Harris vs. Miller, 11 F., 118.
> Dimech vs. Corlett, 12 Moore P. C. C., 199.
> Jones vs. Green, 3 Younge & J., 304.
> Green vs. Price, 13 Mees. & N., 701; 16 *Id.*, 346.
> Beets vs. Burch, 4 Hurl. & N., 511.
> Cushing vs. Drew, 97 Mass., 445.
> Wallace vs. Carpenter, 13 Allen, 19.
> Lynde vs. Thompson, 2 *Id.*, 456.
> Streeper vs. Williams, 48 Pa. St., 450.

"The amount of the sum may always be taken into consideration as an aid to the Court in determining the intention of the parties; and, if it be altogether excessive, this may turn the scale in favor of declaring it intended as a penalty."

Pomeroy, Eq. Jur., 2 Ed., Vol. I., Sec. 440.

"In determining whether an amount named in a contract is to be taken as a penalty or liquidated damages, Courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent. Where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; * * * and, again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the Courts have carried out the intent only so far as it was right and reasonable."

Davis vs. United States, 17 C. of C., 201.

It has been stated that the valuation clause in the charter-party can mean nothing more than a provision for damages in the case of a total loss or non-delivery for which the charterer is liable. It is by no means clear, however, that in any aspect the language could be equivalent to the phrase "liquidated damages." Even if this phrase had been actually used, the Courts, according to the decisions above cited, would disregard it where it would work injustice; but it is not clear that the provision of the contract can be treated as the equivalent of this phrase. As pointed out by the learned trial judge (Opinion, p. 355):

"It is noticeable, however, that neither in the immediate context, nor anywhere in the charter or in the agreement of suretyship, is there any agreement that the sum of $75,000 should be paid for the failure to return the yacht at the end of the charter period. That clause in the charter, on the contrary, stands in immediate connection with, and seems to be, the inducement to the further clause by which the hirer agrees to 'procure security or guarantee to the owner in the sum of

> $75,000 against any and all loss and damage which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage, and by reason of the breach of any of the terms or conditions of this contract."

In the case of Gay Mfg Co. vs. Camp above cited, there was an express promise to pay the liquidated damages, yet the Court held that the sum stipulated should be considered merely as a penalty. There is far greater reason for so holding as to the language of the contract here, for the reference to the sum of $75,000 as security for loss and damage "which may be sustained by the owner" points plainly to the determination of actual loss as a measure of damages. So also does the language of the so-called contract of suretyship, which Judge BROWN holds must be "regarded as virtually one" with the principal contract. The agreement is that "in no case shall the liability exceed the sum of $75,000" Both these provisions that the $75,000 shall be security for the loss "which may be sustained by the owner" and that the liability "shall not exceed the sum of $75,000" distinctly negative the idea of liquidated damages, and call for a determination of actual damages, as in the ordinary case of a penalty in a bond.

In Watts vs. Camors, 115 U. S., 353, this Court, in an opinion by Mr. Justice GRAY, held, in reference to a penal sum named in a charter party:

> "At the common law, indeed, before the Statute of 8 & 9 W. 3, Ch. 11, Sec. 8, judgment might have been rendered for the full amount of the penalty, but in a case like this a court of equity would stay proceedings at law on payment of the damages actually suffered, and at the present day even a court of law would regard such a clause in such a contract as a penalty only and not as liquidating the damages.

The learned Justice goes on to say:

> "In such cases, accordingly, the Courts of the United States, sitting in admiralty, award the damages actually suffered whether they exceed or fall short of the amount of the penalty (citing The Salem's Cargo, 1 Sprague, 389; The Marcella, 1 Woods, 302). In England and in this country a court of admiralty, within the scope of its powers, acts upon equitable principles, and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief."
>
> Watts vs. Camors, 115 U. S., 353.

Although the above case is not precisely similar to the the case at bar, the observations quoted from the opinion are applicable.

> "In considering whether a stipulation to pay a sum of money on breach of condition is to be treated as a penalty or as liquidated damages, the test to be applied is whether the loss which will accrue to the plaintiff from an infringement of the contract can or cannot be accurately *or reasonably calculated in money*, antecedently to the breach. *If it can be so calculated, then the fixing of a larger sum of money will be treated as a penalty.* Where the loss is *absolutely uncertain* it will be treated as liquidated damages."
>
> Mayne on Damages (5th Ed., 1894), p. 148.
> Charleston Fruit Company vs. Bond, 26 F., 18.

In applying the foreging rules to this case,

> "it must be remembered that a charter party is an informal instrument, as often as otherwise, having inaccurate clauses, and that on this account

they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade."

Raymond vs. Tyson, 17 How. (U. S.), 53, citing, Abbott, Shipp., Story's Ed., 188.
Kent, Vol. III., Ch., 47.
Ruggles vs. Bucknor, 1 Paine, 358.
The Volunteer, 1 Sumn., 551, per STORY, J.
Disney vs. Furness, 79 F., 810.

And that in the exercise of their jurisdiction with respect to such bonds,

"Courts of Admiralty act upon enlarged principles of equity rather than the strict rules of common law."

O'Brien vs. Miller, 168 U. S., 287, 297.

II.

IN ORDER TO APPLY THE RULE THAT A STIPULATION FOR DISPROPORTIONATE DAMAGES WILL NOT BE ENFORCED, EVIDENCE OF SUCH DISPROPORTION MUST BE ADMITTED.

The above citations establish the principle that whether a sum stipulated in a contract to be paid for non-performance is called "liquidated damages" or is called a "penalty," the courts will always hold it to be a penalty where the sum named is disproportionate to the actual loss incurred by the breach.

In the present case the trial Court not only disregarded this rule, but it refused to consider the evidence which was presented to it going to show the actual value of the yacht, and, therefore, the actual loss which the libellant had incurred. It not only disregarded the rule as to the effect of dispropor-

tion between the sum named and the actual loss, but it refused to receive any testimony which would enlighten it as to this disproportion. How is the Court to know whether a sum stipulated is exorbitant or extravagant unless it receives evidence of the actual value of the thing in question? Instead of acknowledging and applying the principle that a provision for liquidated damages must be tested by its reasonableness in reference to actual loss, the Court shut its ears to any and all evidence which would enable it to apply such a test. The statement had been made by competent witnesses that the yacht would not have realized $30,000; that she was 18 years old; that nothing had been renewed upon her during her lifetime except the boilers; in short, that she was an antiquated vessel of her type (pp. 142–147). The Court not only refused to consider this evidence but refused to consider any evidence as to damages, and thereby cut itself off from any possibility of determining the question whether the sum stipulated was disproportionate or not. The Court therefore not only failed to apply the well-recognized rule of law, but committed the further error of refusing to receive any evidence which would enable it to make such an application.

The refusal of the Court to consider any question of actual damages or actual value of the yacht, when evidence was offered to prove that this value was grossly disproportionate to the sum named in the contract, was error, and upon that ground, if on no other, the decree and judgment should be reversed.

III.

THERE IS NO GROUND IN THE PRESENT CASE FOR CONSIDERING THE STIPULATED SUM AS LIQUIDATED DAMAGES ON ACCOUNT OF ANY SUPPOSED DIFFICULTY IN DETERMINING ACTUAL DAMAGES.

The only foundation which the Courts have allowed for holding that a stipulated sum in a contract shall be considered as liquidated damages, and not as a penalty, is that the actual damages are incapable of ascertainment. In such a case it is said that the parties may stipulate for a fixed sum which shall be considered as liquidated damages. The reason of the rule is plain. Where damages cannot be fixed with reasonable exactness, it is competent for the parties to agree upon a certain sum beforehead which shall be an approximation to the actual damages by which they shall both be bound.

This principle, however, must be understood with the qualification, which is universal and absolute, that the amount so fixed shall be reasonable and not out of proportion to the actual loss.

Ward vs. Hudson River Building Company, 125 N. Y., 230 (referred to above).

The Circuit Court of Appeals held, as a fact of which the Court could take judicial notice, that the market value of a yacht—not only this yacht, but any yacht—was an " uncertain quantity " *(Opinion*, C. C. A., p. 6*)*, and that from this assumed " difficulty of estimating exact damages, the intention of the parties to consider it as liquidated damages may be inferred " (p. 7).

The rule by which a Court may regard the sum mentioned in a contract as liquidated damages, rather than as a penalty, by reason of the impossibility of ascertaining actual damages, is a familiar one; but we doubt if it has ever been applied before, as the Circuit Court

of Appeals applies it, to the question of determining the value of a specific vessel. The Court apparently holds that, as matter of law, the value of a steam vessel of this character is not ascertainable. No authority can be referred to which makes such an extension of the principle.

In the case of the *East Moline Co. vs. Weir Plow Co.* (Seventh Circuit, June 6, 1899), 37 C. C. A., 62, this question received considerable attention. As already stated, the provision of the agreement in that case was " that the measure of damages for the default of either party to carry out this agreement shall be $50,000." The decision turned specifically upon the application of this provision to a number of different acts of default of varying importance, but the Court held that such a provision as that stated in the contract could only be considered as liquidated damages (p. 68) " where it is evident that the damages for a breach would be uncertain in their nature and impossible of ascertainment by a jury ; " or, again, " where the damages for such a breach being entirely uncertain and speculative in character ; " or, again, " where the damages for a non-performance * * * are not measurable by any exact pecuniary standard." The last phrase occurs in the case of *Trower vs. Elder*, 77 Ill., 452, cited with approval in the *East Moline* case.

> " In general, where the contract is for the performance or non-performance of some other act than the mere payment of money, *and there is no certain measure of the injury which will be sustained from a violation of the agreement*, the parties may, by an express clause inserted for that purpose, fix upon a sum in the nature of liquidated damages which shall be payable as a compensation for such violation."
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> Vol. I., Pomeroy, Equity Jurisprudence, 2d Ed., Sec. 440.

In a contract in which certain acts are to be done or omitted, and the contract is of such a nature that the

actual damages are *susceptible of computation in money*, and the sum is named in the contract as a penalty or forfeiture for a violation, it is to be viewed *as a penalty* and not as liquidated damages, and in such case the *actual damages* sustained will constitute the rule of recovery.

* * * There are many cases in the reports to the effect that, though the sum named is called liquidated damages, it will be held as a penalty if it seems from the contract that it was so intended by the parties and the justice of the case requires such a construction."

White vs. Arleth, U. S. Cir. Ct. So. Dist. of Ohio, 29 Fed. Cas., 978.

In the case of "The Marcella," the owners of the boat made a certain contract for transportation and agreed "to forfeit the sum of $1,000" if they failed to carry out the contract. The United States Circuit Court for the District of Louisiana (Mr. Justice Woods) held that the sum named was a penalty and not liquidated damages, and that no part of it could be recovered as damages unless actual damages were shown, regarding the case as one in which the damages sustained by a breach could without difficulty be ascertained.

Taylor vs. "The Marcella," 23 Fed. Cas., 782.

An examination of the cases which hold that damages shall be considered as liquidated "where it is evident that they would be uncertain in their nature and impossible of ascertainment by a jury" or "speculative in character," or "not measureable by any exact pecuniary standard" shows that they apply to an entirely different state of facts from that presented here.

Thus in *Bagley vs. Peddie*, 16 N. Y., 469: Here the bond was stated to be "in the sum of three thousand dollars, as liquidated damages and not by way of penalty, or otherwise," for the performance of the covenants in a written agreement. One of the coven-

ants was "not to reveal the secrets of a trade in which the principal obligor was to be employed," &c., and it was held "that a breach of this covenant involved damages so uncertain and difficult to be ascertained as that the sum named in the bond should be deemed not a penalty but liquidated damages."

In *Dakin vs. Williams*, 17 Wend., 447, the defendant, having sold out his business, agreed not to carry it on in the county and fixed and liquidated $3,000 as the damage if he violated that provision. This was held to liquidate the damage, because the real damage was uncertain.

Among the other cases where damages were held to be uncertain, and, therefore, supported an agreement for liquidated damages, was one for damages for not assigning a lease *(Knapp vs. Maltby*, 13 Wend., 587*)*; an agreement not to carry on the business of perfumery in London *(Price vs. Green*, 10 Mees. & Wells., 346*)*; an agreement of one attorney with another not to carry on the business of attorney within fifty miles or interfere with or solicit the clients of the late copartnership *(Galsworthy vs. Strutt*, 1 Wells., Hurl. & Gord. Exch. Reps., 659*)*; the failure to complete four houses on the day specified *(Ward vs. H. R. B. Co.*, 125 N. Y. 230*)*.

On the other hand, a refusal to abide by an arbitrator's decision, when the decision made a money award, was held to be certain *(Spear vs. Smith*, 1 Denio, 464*)*. In *Kemble vs. Farren*, 6 Bing., 141, a manager brought suit against an actor for a violation of an agreement to perform at Covent Garden for four years. The plaintiff had agreed to pay the defendant a fixed sum every night the theater should be open. The agreement provided for a payment of "one thousand pounds liquidated damages, and not as a penalty or penal sum, or in the nature thereof," for a default by either of the parties in any provision of the agreement. The default was on the part of the actor, and the question arose as to whether the clause providing for liquidated

damages was not supported by the uncertainty of the agreement; but the Court held that, as a certain sum was to be paid to the defendant, the agreed damages could not have been considered otherwise than as a penalty as to such fixed sum, and must be construed in the same way in respect to those covenants of which the breach would result in uncertain damages.

The above cases illustrate the nature of the distinction between certain or ascertainable and uncertain or speculative damages, in other words, damages for non-performance of a contract which are or are not "measurable by any exact pecuniary standard." The damage suffered by the practice of a rival in business, by the failure to assign a lease, by the revelation of trade secrets, is clearly of such an uncertain character. In such cases, it may well be that the parties, knowing the impossibility of determining what loss will result from a breach, may stipulate beforehand upon a reasonable sum, which shall be assumed to measure the loss.

The present case is not of this character. Here the damage is the loss of a certain vessel, which cost a certain ascertainable sum to build, which had been in use a certain number of years, and which had suffered a certain deterioration. That the value of such a vessel should be put in the same category as the effect of competition in business, or of the revelation of trade secrets; that it should be decided, as matter of law, to be unascertainable, to be not measurable by any pecuniary standard is, we submit, an absolutely novel proposition. This is not a question of damages for loss of use. It is a question of damages for the loss of a ship. The fact that the ship is a yacht makes no difference. It is a specific article, the product of one of the ordinary forms of manufacture, and the cost of manufacture of this article is readily ascertainable; the value of the materials and labor which enter into its construction are determinable with the utmost facility. There are great numbers of persons who are

entirely competent to give evidence as to the value of such a vessel. It is as readily ascertainable as the value of any other product of manufacture. It is not even an unusual or uncommon product of manufacture. The question of fluctuations in value does not here arise. The only question is: "What was the value of the yacht, assuming her continued existence, at the time she was required to be redelivered?" Her master said $30,000, and doubtless other estimates might have been made, as is frequently the case where questions of value arise in courts of law, but the question is, nevertheless, one which, in such a court, would undoubtedly have been considered a proper question for the jury. Certainly a maximum value could have been ascertained, which this respondent has a right to contend should be a limit of liability. Nor would it occur to any one, in so submitting the question of value to a jury, that it was one which a jury could not determine by any exact pecuniary standard. In an age and country where juries in every great city are daily called upon to determine, and do determine, the damages for the loss of a leg, or an arm, or any other member, for the obscure consequences of disease or wounds, for a loss of human reputation or a loss of human life, it seems idle to say that, as matter of law, a jury could not determine the value of a yacht.

There is no such uncertainty about the value of a given vessel as there might be in the case of the losses or defaults above referred to. It can be shown as already stated, that the "Kanapaha" was built by the Cramps in 1880 at a cost of $59,000, and that she was sold four years later for $50,000; that during this period of 18 years no substantial repairs had been made upon her; that she was an old vessel, destitute of modern improvements, and that she would not sell for more than $30,000.

Great stress was laid in the argument below upon the effect of the covenant to keep in repair in this alleged charter-party, in its bearing on the rule in Young

vs. Leary, and similar cases. This obligation to keep in repair is alleged to have extended to various parts of the vessel; and there was the further covenant that "the hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like." Will it be contended, in the case of a breach of the covenant to keep in repair some of these items, that if suit had been brought to recover the loss and damage upon such items not so kept in repair, there would have been any difficulty in determining the value of each of the items? If a crank shaft had broken, the cost of the crank shaft would have been readily ascertainable. If the bows of the vessel were stove in, the cost of the repair of the injury could be exactly determined. If a mast, or a smokestack, or a part of the frame, or a rudder, or the plates in the hull had to be replaced, the measure of damages would be the cost of replacing them, and nobody would contend for an instant that this cost could not be fixed with exactness.

The same principle applies to the vessel itself. No one can pretend but that any shipbuilder could have duplicated this craft, and that the sum of money for which she could have been duplicated could be precisely determined. In view of this fact it is idle to say that the actual loss is not ascertainable. It is equally clear that it is disproportionate to the sum stipulated. Judging from the fact that she cost $59,000 new in 1880, at a time when the cost of shipbuilding was vastly greater than it is to-day, she could readily have been duplicated as a new ship for much less than that figure. If a new ship could have been built which was in every respect the duplicate of the lost yacht, except that the new ship was new while the lost yacht was 18 years old, and could have been built for about half the amount which this petitioner is now called upon to pay—namely, $75,000—the imposition of that sum as a measure of damages is grossly dispropor-

tionate to the actual loss, and is the very kind of inequitable contract from which the Courts have always relieved the contracting party.

IV.

THE SUGGESTION THAT NO MARKET VALUE CAN BE DETERMINED FOR A YACHT CANNOT BE SUSTAINED.

The contention has been made, on behalf of the libellant, that a yacht stands in a different position as to the determination of market value from other manufactured articles ; that, the question not being governed by the ordinary laws of demand and supply, a stipulated sum may be taken as liquidated damages in the case of the loss of a yacht where it would not be so taken in the case of the loss of any other specific object. This contention impressed the Appellate Court so strongly that they were led into the remarkable statement that "the fact is one of which the court may take judicial notice that the market value of yachts is a very uncertain quantity." Stress is also laid upon the fact that Captain Atkinson stated in his testimony, as a general proposition, that yachts have "a fancy value."

The obvious answer to this contention is that a yacht is the product of a manufacture in which great numbers of persons are engaged in competition ; that the materials which enter into its construction are all common articles of merchandise having definite values, and that it is as easy to determine upon the ordinary principles of mercantile and manufacturing valuation what the cost of a given steam vessel shall be as it is to determine the cost of any other manufactured product. The mere fact that an article or a structure may be re-

placed in the ordinary way of trade and manufacture is sufficient to establish this fact. That yachts are generally built to order and not to be kept in stock for sale to the general public does not affect the question. The same is true of nearly all steam vessels. The fact that yachts differ in their interior details is unimportant. This fact is also true of all steam vessels. The essential point is that every item in the cost of construction of the yacht has a determinable market value, and the cost of the yacht as a whole has such a determinable value.

This principle has been substantially established by the Supreme Court of the United States in the case of The Conqueror, 166 U. S. 110. In that case the question which arose directly was a question as to the value of the *use* of a yacht, which is a very different question from the value of the yacht itself. Referring to the difficulties of this question Mr. Justice BROWN said :

> "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot be often applied, *as it is only in the larger ports that there can be said to be a market price for the use of vessels*, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.
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> * * * * * *
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> "The amount of demurrage allowed, too, was so great as, if not to shock the conscience, at least to induce the belief that it must have been estimated by witnesses who were most friendly to the owner. The yacht cost originally $75,000. The proposition that her use for a little more than five months, during the autumn and winter, should be worth to her owner $15,000 over and above all her expenses, for which a separate allowance was

made, is putting a strain upon our credulity which we find ourselves quite unable to bear. The truth is, that estimates of value made by friendly witnesses, with no practical illustrations to support them, are, as observed by the various courts through which the case of Sturgis vs. Clough passed, too unsafe, as a rule, to be made the basis of a judicial award, unless it be shown with much greater certainty than it is in this case, either that the vessel was earning profits, or that she belonged to a class of vessels for which there was a steady demand in the market."

The Conqueror, 166 U. S., pp. 127 and 134.

This Court, in passing upon the question, did not disturb the conclusions as to damages for the loss of use of the yacht reached by the Court below. It is quite evident, however, from the language of Mr. Justice BROWN in the opinion, that, while there might be some difficulty in ascertaining the damage consequent upon the loss of use for a period of time, although not an insuperable difficulty, there would be no difficulty at all in determining the value of the yacht itself, especially in the larger ports.

Nor is there any difficulty in determining the effect to be given to Captain Atkinson's statement in evidence that yachts have in general a "fancy value." Of two intending purchasers, one may be willing to give more than another for a particular yacht, because the yacht suits his particular necessities, and there may, therefore, be a greater range in obtainable prices than there would be in the case of articles where the fancy of individual purchasers entered less into consideration. But whatever may be the range of such prices, it is certainly possible in every case to fix a maximum value of such a vessel, and the maximum value can in no case be more than the cost of duplication, less the wear and tear which the yacht has undergone. It is not pretended, in reference to this yacht,

that she was in any respect what is called, to use a common but expressive term, "a fancy article." She was an ordinary steam yacht, with old engines, of a type such as prevailed in the year 1880, a type which has since then been enormously improved upon and cheapened. She has no remarkable qualities either as to speed or as to economy of operation. She could only make eleven or twelve knots, and her coal consumption for her speed was large. Everything goes to show that she was a boat of an exceedingly ordinary type, and whatever may have been the range of prices which different purchasers would have been willing to pay for her, it was certainly possible to determine a maximum market value. This is the only important question here; for it appears that the valuation placed upon her in this contract, and enforced by the Court, was about double the amount anyone competent to testify would have sworn was a maximum estimate of her value. The case is one of those where the damages stipulated are grossly disproportionate and excessive, and where the Court should apply equitable principles for the relief of the contracting party. Even in those cases where the Courts have been willing to regard the sum as liquidated damages, on account of the impossibility of ascertaining the actual loss, they have still insisted that the stipulated sum shall be proportionate to the presumable or probable loss. Exercising as they do the widest liberty in interpreting these contracts for stipulated forfeitures, they have looked first and foremost at the question of disproportion, and no case can be found where parties have been held bound to a stipulated sum for damages, where the sum stipulated was "disproportionate," to borrow the phrase of Judge GRAY, of the New York Court of Appeals, "to the presumable or probable damage, or to a readily ascertainable loss."

V.

THE PRESENT CASE IS CLEARLY DISTINGUISHABLE FROM THAT OF VALUED POLICIES OF INSURANCE OR OF VALUATIONS STIPULATED IN CONTRACTS BY COMMON CARRIERS.

It has been attempted by the libellant, to avoid the application of the well-settled law on the subject of penalties and liquidated damages in a contract, by reference to what are asserted to be the analogous cases of valued policies of insurance. The Court of Appeals even went so far as to say:

> "It is competent for the parties themselves to fix the value of given property as the basis for ascertaining damages in the event of destruction or injury to it, and the agreement is, in the absence of fraud or mutual mistake, conclusive upon them."

The learned Court refers in support of this statement in its opinion to the following cases:

Providence & Stonington Steamship Co.. vs. Phœnix Ins. Co., 89 N. Y., 559.
Hart vs. Pennsylvania R. R. Co., 112 U. S., 331.
Graves vs. Lake Shore R. R. Co., 137 Mass., 33.
N. Y., N. H. & H. R. R. Co. vs. Sayles, 58 U. S. App., 18.

We submit that the bearing of the cases referred to by the learned Court of Appeals was totally misconceived, and that they have no application whatever to the case at bar. The cases referred to are cases either of valued policies of marine insurance or limited liability contracts of common carriers. Neither of these presents any analogy to the contract in the case at bar, and both of them are governed by a totally different principle.

We will examine them in detail:

I. Providence & Stonington S. S. Co. vs. Phœnix Insurance Co., *et al.*, 89 N. Y., 559:

This is a case of a valued policy of insurance. The defendant insurers had insured a vessel in various sums, amounting altogether to $75,000, and this, for the purposes of the insurance, was declared to be the value of the vessel. The vessel was wrecked, but subsequently got off by the aid of a wrecking company and repaired. The value of the repairs amounted to $46,000, which was paid by the insurers, and the expense of salvage amounted to $21,840. This last amount it was contended by the insurance companies, should be adjusted by general average between the insured and the insurers in the proportions of their respective interests, the interest of the insured being taken to be the sum of $200,000, by which the actual value of the vessel exceeded the stipulated value in the policy. The Court held that the stipulation in the policy governed, on the ground that the insured had paid the insurers for this indemnity, and that they were entitled to receive it. Says DANFORTH, J.:

> "The insurers are estopped from saying there was any value in excess of the $75,000 agreed upon, and to that extent they undertook to indemnify the owners. They now seek to divide the loss by presenting a different basis of value. If they succeed, the assured will lose the indemnity for which they paid, and the consequences of a loss would be cast upon them. Such a result is required by no adjudged case, and would be against the principles both of law and equity."

The insurers were therefore required to pay the entire ascertained loss, such loss being within the amount for which the vessel was insured.

In his opinion at the trial Judge BROWN pointed out that the present contract had no resemblance to a valued policy. He said:

> "The valuation clause in marine policies of insurance is not analogous, I think, to this charter. In such policies that clause has reference to a single object—namely, the rights of the parties upon a loss by sea peril. In this charter the object was to determine, also, the amount of security which was designed to cover and does cover a multitude of parts, as well as the important obligation to pay the charter hire."
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> Transcript, p. 358.

Judge BROWN might have added a still broader line of distinction—namely, that the contract of marine insurance is a contract where the insurer assumes certain risks, and for which he receives a certain compensation graduated upon the nature of the risks. If the insured desires to enlarge the risk of the insurer he pays therefor a higher premium. If the insured desires to limit his risk he has the right to do so in the policy, and for the assumption of such limited risk he receives accordingly a limited premium. No such conditions attach to the charter in the case at bar.

If the principles of law in reference to valued policies of marine insurance are to govern in other contracts, where the element of graduated consideration is entirely wanting, then every decision which has been cited above, where a provision for liquidated damages is held to be a penalty, is wrong, and the Courts can no more grant relief in those cases—although it has been their universal practice to do so, both in England and America, for more than a century—than they can in the case of a valued policy of insurance.

2. Hart vs. Pennsylvania R. R. Co., 112 U. S., 331:

The same distinction which has been drawn above applies to the case here cited. It is a leading case, one which has been repeatedly cited and followed during the seventeen years since it was reported. It shows the distinction between the two classes of con-

tracts, as fixed by the Supreme Court of the United States, with such clearness and force that we quote from it at length:

The case was one of a contract of carriage between a common carrier, the Pennsylvania Railroad Company, and a shipper, for the transportation of certain horses. The bill of lading stated that the horses were to be transported "upon the following terms and conditions which are admitted and accepted by me as just and reasonable, first, to pay freight thereon" at a rate specified "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding $200 each, etc."

The horses shipped were injured in transportation, and being race horses were of a much higher value than that specified in the bill of lading. The Court held that the shipper was bound by the valuation named in the bill of lading, on the ground that the compensation for the transportation was directly based upon the valuation made therein. This is the same principle which applies in the case of valued policies, and it completely distinguishes both the valued policies and the common carrier's limited-liability contracts from the contract at bar.

Mr. Justice BLATCHFORD, delivering the opinion of the Court, said:

> "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, 'a limited liability live-stock contract,' and is confined to live-stock. * * * The presumption

is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight. * * * There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage if there is no loss ; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assumed."

So careful was Mr. Justice BLATCHFORD that this case should not conflict at all with the principles governing ordinary cases of liquidated damages and penalties, that he repeats the principle governing his decision at the end of his opinion, as follows:

"The *distinct ground of our decision in the case at bar* is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the

negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

3. Graves vs. Lake Shore R. R. Co., 137 Mass., 33:

This case is the case of a carrier's limited liability contract, and is precisely similar to the Hart case. It was decided upon similar grounds.

The Court said that the defendant's "claim is that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value. * * * It is just and reasonable that a carrier should base his rate of compensation to some extent upon the value of the goods carried; this measures his risks and is an important element in fixing his compensation. * * * Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of carriage, including the risk of loss from the negligence of servants."

4. N. Y., N. H. & H. R. R. Co. vs. Sayles, 58 U. S. App, 18:

This case is similar to the Hart case and is decided upon that authority.

The petitioner therefore contends:

FIRST. That whether a sum designated in a contract as the amount to be paid in case of a breach is stated to be a penalty or is stated to be liquidated damages, the courts will disregard the language used and will hold it to be a penalty if the sum named is disproportionate to the actual loss.

SECOND. The evidence offered in the case at bar was sufficient to show a gross disproportion between the sum stipulated in the contract and actual loss.

THIRD. Both the trial Court and the Appellate Court expressly refused to consider this evidence and assessed the damages on the basis of the stipulated sum without reference to the evidence of actual loss by which the disproportion was proved.

FOURTH. There is no difficulty in ascertaining the value of a yacht as a subject of purchase and sale or as a manufactured product.

FIFTH. The cases relating to valued policies of marine insurance and limited liability contracts of common carriers, on the authority of which the Court of Appeals decided to adhere to the stipulated sum, have no application to the circumstances of this case.

Point II.

THE BREACH OF THE CONTRACT, ALLEGED AS THE GROUND OF RECOVERY, BEING THE FAILURE TO REDELIVER THE VESSEL, THE CASE FALLS WITHIN THE PRINCIPLE THAT, WHERE A CONTRACT HAS BEEN MADE TO DELIVER A SPECIFIC THING, AND THE THING HAS IN THE MEANTIME BEEN DESTROYED, NO OBLIGATION RESTS UPON THE CONTRACTING PARTY TO DELIVER IT OR ANSWER IN DAMAGES UNLESS THE DESTRUCTION WAS DUE TO HIS NEGLIGENCE.

Upon this question the leading case is that of *Young vs. Leary* (decided in the New York Court of Appeals in November), 1892, 135 N. Y., 569. This

was an action brought against Leary, the surety on a charter party executed by one McKay. The provisions of the charter party were similar to those in the case at bar. There was a contract on the part of the charterer to insure the vessel for the benefit of the owner during the term of the charter party, which expired in the month of October, 1885. This covenant in the contract was duly performed. It was also provided that all other losses not covered by the policy described during the term of the charter party should be paid by the charterer. When the charter party terminated in October, 1885, the parties were negotiating for the purchase and sale of the vessel. The negotiations fell through, and the vessel remained in the possession of the charterer, and was in such possession when she was destroyed by fire at sea in the following January. There was the usual stipulation for the redelivery of the vessel, which obligation, however, was one that would have devolved upon the charterer without any written contract. The question then was: Could the plaintiff recover for the failure to redeliver subsequently, after the vessel had been lost? Mr. Justice PECKHAM, in delivering the opinion of the Court, said:

> "The questions in this case arise out of a charter-party executed on the 17th of October, 1884, by the Washburn Steamboat Co., and one McKay, for whom the defendant became surety. The company on the day mentioned let and McKay hired the steam propeller called the 'Alicia A. Washburn,' of which the company was the owner, for the term of twelve months, from October 17, 1884, to be employed in lawful trade between Key West and other points on the West Florida coast on the terms and conditions mentioned in the charter-party. Among other provisions thereof was one by which McKay agreed to procure a fire and marine insurance policy for $27,000 for one year on

such boat, in the name of the company, and to pay the premium thereon as an additional consideration of the charter. McKay also agreed to pay a certain rent per month for the use of the boat, commencing on the 17th of October, 1884, and also agreed that on the termination of the charter he would '*deliver the said steam propeller to the Washburn Steamboat Company, or their legal representatives, in New York harbor, in the same good condition as she is now in, ordinary wear and tear excepted.*' Another provision in the charter-party was as follows: 'That said McKay hereby assumes all fire. marine and other risks of damage that may happen to said vessel and also assumes all liability of every kind and nature, for which said propeller or its owners may be responsible during the term of this charter, which is not covered by fire and marine insurance hereinbefore mentioned.'

"McKay procured in the name of the company a fire and marine policy of insurance upon the vessel for $27,000, for one year from October 17, 1884, and paid the premium thereon as he had agreed to do in the charter-party.

"The vessel was burned at sea in January, 1886."

135 N. Y., pp. 572, 573.

The Court further said:

"The remaining obligation of McKay under this charter-party is contained in that provision by which he agreed, in the language already quoted, to deliver the vessel to the company in New York harbor.

"It has been claimed on the part of the plaintiff in the courts below, and it is now urged here that this promise to deliver was on its face an absolute and unconditional one, and a failure to fulfill it would not be excused by the entire destruc-

tion of the vessel before breach and without fault on the part of the charterer. It is true that the vessel was not destroyed at the time when by the terms of the original promise McKay had bound himself to deliver it in New York harbor. The question is whether the contract to deliver was absolute and only to be complied with by an actual delivery within the time agreed upon, or whether a destruction of the thing hired before breach and without the fault of him who hired it would not absolve the latter from his contract. If it would, there is the further question whether the facts herein do not show a waiver of the contract to deliver at the specified date and an implied extension of the time for such delivery and the destruction of the vessel within the time thus extended without the fault of the hirer. Or at least whether the facts proved were not enough to permit a finding of the fact of such waiver and extension.

* * * * *

"We do not think that the law applicable to the class of cases of which that of *Harmony vs. Bingham (supra)* is a conspicuous example, applies here.

"The contract in this case comes, as it seems to us, under another class which relates to the hiring for use of the thing hired, and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. *Even in such cases of express contract, there is implied a condition of the continued existence of the thing which is the subject of the contract, and if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused.* If a horse be delivered to one under an express promise to redeliver when demanded, and the horse die before demand, and without fault on the part of the bailee, he is excused (Williams vs. Lloyd, W.

Jones, 179; Sparrow vs. Sowgate, *Id.*, 29). Mr. S. Martin Leake, in his digest of the Law of Contracts, at page 706, says: 'The authorities establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the contract becomes impossible from the perishing of the thing without the default of the contractor' *(Idem*, pp. 575, 576, 577*)*.

* * * * * *

"When language like that found in this agreement is used, the condition of continued existence is implied, and as thus interpreted it creates nothing more of an obligation than that which the law raises without any such promise. When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it. So it was held in the case of *Ames v. Belden* (17 Barb., 513), where the defendant was sued for its value for not returning a steamboat according to the condition of the charter-party, by which defendant agreed to return the same at the expiration of the term in as good condition as it then was, excepting ordinary use and wear. The Court said the language must be held to have reference to the ordinary obligation

of such a bailee to return the article hired, and defendant was exempt if before the time arrived the article had been destroyed without his fault. This is only another way of saying that *an obligation expressed in such language carries with it an implied condition that the article to be returned shall be in existence at the time when the obligation to return arises, and, if in the meantime it has been destroyed without the default of the promisor, he is not bound by his contract thus expressed.* The case is thus entirely supported by the cases above cited" (pp. 577, 578).

"It seems to me as if authorities are not required upon the proposition that in a contract containing the ordinary language providing for redelivery, an implication of continued existence of the thing to be returned is to be made, for, to again quote the language used by Mr. Justice BLACKBURN in *Taylor vs. Caldwell (supra)*: 'In the course of affairs men in making such contracts in general would, if it were brought to their minds, say that such should be the condition.' There is nothing in the other portions of the charter-party which affects in any way to the detriment of the defendant this particular question. If there had been no provision for insurance, and the vessel had been destroyed by fire before the 17th of October, 1885, and without the fault of McKay, it seems to me plain that neither he nor his surety, the defendant here, would be liable on the promise to deliver the vessel in the harbor of New York. The provision for insurance was complied with by McKay, and hence no liability attaches by reason of it" (pp. 578, 579).

In that case it appeared that Leary, the surety of Mc Kay, had insured the vessel against loss by fire in the sum of $17,000, and had collected the insurance and had retained it for his own use and benefit, and

the Court said that it might be that the plaintiff would have an action to recover from the defendant the amount of the insurance as for money had and received by the defendant to his use.

In the opinion in the case at bar delivered by Judge Wallace for the Circuit Court of Appeals the principle is stated thus:

> "A contract of hiring presupposes the continued existence of the thing hired during the term of hiring, and because the parties must have known that otherwise it could not be fulfilled and the whole contract is founded upon that understanding, the courts have conconstrued express promises for the redelivery of the thing in as good condition as when received as intended merely to stand for the implied condition, and not as intended to impose a more stringent liability upon the hirer. Such a case was *Young vs. Leary* (135 N. Y., 569). That was an action to recover of a charterer the value of a vessel which was destroyed during the charter term by fire, and was brought for the breach of a condition in the charter to deliver the vessel to the owner at its termination 'in the same good condition as she is now, ordinary wear and tear excepted.' The Court read the condition as intended to create no other obligation than would have been raised by implication without it, and said: 'When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.' Decisions to the same effect are *Ames vs. Belden* (17 Barb., 513), and *Hyland vs. Paul* (33 Barb., 241)" (*Transcript*, pp. 280, 281).

In other words, the liability under the contract was the ordinary liability of a bailee.

But the Circuit Court of Appeals having thus stated the law as enunciated in *Young vs. Leary*, goes on to say:

> "On the other hand, the Supreme Court of Massachusetts decided in an action brought to recover damages to the article hired caused by accidental injuries, where the contract contained a condition to return it 'in as good order as when received, customary wear and tear excepted,' that the bailee was not excused from performance. *Harvey vs. Murray* (136 Mass., 377)." "In *Drake v. White*, 117 Mass., 10, there was a bailment of personal property by a debtor who pledged it as collateral security for a loan to the defendants upon the express promise of the latter 'to deliver the same, or its equivalent in money,' on the payment of the loan. The court, holding the creditor not discharged by the destruction of the property by fire without his fault, based its decision upon the terms of the express contract to redeliver, and used the language: 'if, in the common case of a pledge, the common-law contract was reduced to writing it would contain, among other things, a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing and have omitted to attach to the defendant's liability for the property any limitation whatever. On the contrary, their express promise is to do one or other of two things—either to return the property specifically or to pay for it in money.'
>
> "The question in all cases of this kind is a question of the construction of the contract, and the defense of impossibility of performance has been sustained, not because contracts of hiring are not within the general rule, but because the terms of the particular contract were thought to withhold it from the rule *(Dexter v. Norton*, 47 N. Y., 62*)*.
>
> *Transcript*, p. 281.

Judge WALLACE then goes on to adopt the supposed

doctrine of these Massachusetts cases, thereby distinctly overruling *Young vs. Leary*, which has always been regarded since it was decided as being the settled law, and which was generally held to have overruled the few contradictory earlier cases.

The case of *Harvey vs. Murray*, 136 Mass., 377 (decided in 1884), has no application here. It was a case of hiring, where the defendant hired the plaintiff's piano, with an agreement "to return it in as good order as when received, customary wear and tear excepted." The piano was injured in a storm, and the Court rightly held that the defendant was required to make good the injury. Obviously, this has nothing to do with the question of the impossibility of performance by the destruction of the *res*.

Drake vs. White, 117 Mass., 10, also cited by Judge WALLACE, is a case where a safe was held by the defendant as collateral security for debt, and an express promise in writing was made by the defendant upon payment of the note to redeliver the safe "or its equivalent money." The safe was destroyed by fire, and the Court held that the impossibility of performing one part of the alternative promise did not relieve the defendant from the obligation to perform the other.

Neither of these cases affects the question in the case at bar.

The cases of *Warth's Executrix vs. Mack*, 51 U. S. App., 133, and *Burrill vs. Crossman*, 35 U. S. App., 608, have no application to the present case. The first was a case where the parties contemplated the event of the destruction of the thing in question and made an agreement providing for that event. The Court decided that they must be held to that agreement. The second was an action for demurrage in the unloading of a cargo at Rio at the time of the revolution. There the acts of the revolutionists were one of the reasons alleged to justify the inability of the parties to unload. The Court held that the obligation of

the charterer to have his work completed within that period, whatever circumstances occurred, was one that could not be met by the suggestion that the revolution caused delay.

The deciding principle in *Young vs. Leary*, as it must be in this case, was declared in *Taylor vs. Caldwell*, 3 Best & Smith, 826, 32 L. J. Q. B., 164.

In this case the defendants agreed to let plaintiffs have the use of the Surrey Gardens and Music Hall on certain days for the purpose of giving entertainments. Before the first of these days the Music Hall was destroyed by fire, so that the entertainments could not be given, and without fault of either party.

Held, that defendants were excused from performing their part of the contract, the Court declaring the following principle:

> "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time of fulfilling the contract arrived, some particular specific thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; then in the absence of any express or implied warranty" (that is, understood in fact between the parties; not implied in law) "that the the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contracting parties."

The principle was extended further in *Appleby vs. Myers*, L. R., 2 C. P., 651. There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and

to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract; that there was no absolute promise or warranty by the defendant that the premises should at all events continue to exist. The Court said:

> "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither."

See, also,

Benjamin on Sales, 3 Am. Ed. Sec. 570.
Wells vs. Calnan, 107 Mass., 514.

These cases were cited and followed by the Supreme Court of the United States in "The Tornado," 108 U. S., 342. That was a libel in Admiralty against the cargo of the ship "Tornado" brought by the master and owners of that vessel, to recover freight money. The ship, while moored at a wharf in New Orleans and bound on a voyage to Liverpool, England, and before she had broken ground for the voyage, was so injured by fire that she was rendered unseaworthy and incapable of earning freight.

Her master had given bills of lading for the transportation from New Orleans to Liverpool of certain bales of cotton.

Held, that no recovery from the shipper could be had by the master and owners on the contract of affreightment, upon their offering to transport the cotton by another vessel, the Court saying:

> "We are of opinion that by the disaster, which occurred before the ship had broken ground or

commenced to earn freight, the circumstances with reference to which the contract of affreightment was entered into were so altered by the supervening of occurrences which it cannot be intended were within the contemplation of the parties in entering into the contract, that the shipper and the underwriters were absolved from all liability under the contract of affreightment. The contract had reference to a particular ship, to be in existence as a seaworthy vessel and capable of carrying a cargo and earning freight and of entering on the voyage. All the fundamental conditions forming part of the contract of the shipowner were wanting at the time when the earning of the freight could commence. * * * The shipowner was entitled to freight only for carrying the cargo and delivering it at Liverpool, with the implied covenant that this particular vessel was to take it on board and enter on the voyage. *Before that event occurred this vessel was substantially put out of existence by no fault of the shipper,* and he had and could have no benefit from the contract."

The Tornado, 108 U. S., pp. 349–351.

See, also,

Price vs. Pepper, 13 Bush., 42.
Dexter vs. Norton, 47 N. Y., 62.
Sch. Dist. No. 1 vs. Douchy, 25 Conn., 530.
Thomas vs Knowles, 128 Mass., 22.
Lovering vs. Coal Co., 54 Pa. St., 291.
Walker vs. Tucker, 70 Ill., 527.

The case of *Dexter vs. Norton et. al., 47 N. Y., 62*, is clearly an authority against the libellant, for the Court of Appeals held that the liability for the non-performance of a contract depends upon the continued existence of the person or thing. In that case the defendant had contracted to deliver 161 bales of cotton which subsequently were accidentally destroyed by fire. Chief Judge CHURCH, in rendering the opinion of the Court, said :

"The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract" (p. 64).

* * * * * *

The same rule has been laid down as to property: "As if A agrees to sell and deliver his horse Eclipse to B on a fixed future day, and the horse die in the interval, the obligation is at an end" (Benjamin on Sales, 424). In replevin for a horse, and judgment of *retorno habendo*, the death of the horse was held a good plea in an action upon the bond (12 Wend., 589). In *Taylor vs. Caldwell*, 113 E. C. R., 824, *supra*, A agreed with B to give him the use of a music hall, on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. BLACKBURN, J., at the close of his opinion, lays down the rule as follows: "*The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance.*" And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing" (p. 65).

* * * * * *

"Upon the grounds upon which this rule is based, of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, *the condition being that the property shall continue to exist.* If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the excep-

tion, to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved" (pp. 66, 67).

In *Dolan vs. Rodgers, 149 N. Y., 489*, the Court of Appeals, in its opinion by Judge VANN, again held that the law implies a condition that the property shall continue to exist. In speaking of the English case of *Taylor vs. Caldwell*, 32 L. J., Q. B., 164, Judge VANN said:

"That case was made the basis of a judgment rendered by this Court in an action involving the sale and delivery of specified articles of personal property, under such circumstances that the title did not vest in the vendee, and it was held that, as the property was destroyed by an accident, without the fault of the vendor, so that delivery became impossible, the latter was not liable to the vendee in damages for the non-delivery, because the law implied a condition that the property should continue to exist *(Dexter v. Norton*, 47 N. Y., 62)," (pp. 492, 493).

And then he continued:

"So contracts for personal services requiring skill, which can only be performed by the person

named, are held not of absolute obligation under all circumstances, but subject to the implied condition that the person designated shall be able to perform at the time specified (Spalding vs. Rosa, 71 N. Y., 40). Judge ALLEN, in delivering the opinion of the Court in the case last cited, said: 'Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract' *(Id., p. 44)*.

"There are many cases holding that the continued existence of the means of performance, or of the subject matter to which the contract relates, is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception, and, as said in *Dexter vs. Norton (supra)*, it operates 'to carry out the intention of the parties under most circumstances, and is more just than the contrary rule'" (p. 66) *(Tone vs. Doelger*, 6 Rob., 251, 256; *Walker vs. Tucker*, 70 Ill., 527; *Thomas vs. Knowles*, 128 Mass., 22; *Field vs. Brackett*, 56 Me., 121; *Scully vs. Kirkpatrick*, 79 Pa. St., 324, 332; *Shear vs. Wright*, 60 Mich., 159; *Howell vs. Coupland*, L. R. [1 Q. B. D.], 258; *Robinson vs. Davison*, 40 L. J. Ex., 172; *Appleby vs. Myers*, 36 L. J. C. P., 331, 336*)*.

Idem, pp. 493, 494.

In *Lorillard vs. Clyde et al., 142 N. Y., 456*,

Chief Judge ANDREWS, in rendering the opinion of the Court of Appeals, said:

"But it is now well settled that *when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation.* Executory contracts for personal services; for the sale of specific chattels, or for the

use of a building, are held to fall within this principle. *(Dexter vs. Norton*, 47 N. Y., 62; *People vs. Globe Mutual Ins. Co.*, 91 *Id.*, 174; *Taylor vs. Caldwell*, 113 Eng. C. L., 826.) These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the Courts, in accordance with the manifest intention, construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrive. So, if, after a contract is made, the law interferes and makes subsequent performance impossible, the party is held to be excused *(Jones vs. Judd*, 4 N. Y., 412*)*."

Idem, p. 462.

In *Lindsey vs. Gordon*, 1 Shepley (13 Maine, 60), decided by the Supreme Judicial Court of Maine in April, 1836, and cited by Judge PECKHAM in rendering the opinion of the Court in *Young vs. Leary* (see 135 N. Y., p. 580) John Lindsey of Portland had agreed to convey the schooner "Spartan" to Thomas Gordon, on payment of three notes given for her, the first to be paid within one year, and at the same time Gordon received possession of the vessel and gave to Lindsey a writing promising to deliver to him a "load of hardwood within thirty days towards the payment of the first note," and "to keep said vessel in good order and to deliver her up to said Lindsey" on failure to pay the notes as they fell due. The wood was not delivered, and in forty days a small payment was made on the first note. Before one year had passed the schooner was lost at sea while in the possession of Gordon. Chief Justice WESTON, in rendering the opinion of the Court, said:

"By accepting a partial payment after the thirty days, we consider the plaintiff to have waived his right to the immediate return of the vessel and to have assented to the continuance of the contract, and that the vessel should still continue in the possession of the defendants. It remained then at the

> plaintiff's risk, and being lost without the fault of the defendant, redelivery by them is excused and no action lies against them therefor" (*Idem*, p. 63).

The learned counsel for the libellant seem to rely on what they allege to be a limitation of the principle which we assert, although such alleged limitation is not referred to by Judge WALLACE in his opinion, but is claimed to be found in the language of Judge PECKHAM in *Young vs. Leary*, where that learned Judge says:

> "It is otherwise if the lessee has covenanted to repair or rebuild (*McIntosh vs. Lown, supra; Phillips vs. Stevens*, 16 Mass., 238.)"
> *Young vs. Leary*, 135 N. Y., p. 578.

From an examination of these two cases and all the other cases cited by Judge PECKHAM we are able to deduce readily the following principle: Where the covenant is to "*keep in repair, support and maintain the fences and buildings*," as in *Phillips vs. Stevens*, 16 Mass. Reports, p. 238, or simply to "*keep the buildings and fences* in good repair, except natural wear and tear," as in *McIntosh vs. Lown*, 49 Barbour, page 554, the lessee is bound to rebuild in case of accidental destruction by fire or otherwise. But where the covenant of the lessee contains the qualifying words: "*To repair or keep in repair and leave the premises in the same state as he found or received them*," or language to that effect, he is NOT bound to restore buildings destroyed, by fire or otherwise, during the term, without his fault.

If we examine the agreement or charter party printed in the *Transcript* at pages 15 and 16, we find that the covenant bound the hirer, Chester S. Lord, to "keep said yacht in repair," and to "surrender said yacht * * * at the expiration of this contract in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted." The

covenant reads, leaving out the immaterial part: "That the hirer will carry out the provisions of the charter party made on the first day of April last, and will, until the expiration of this contract, keep said yacht in repair, * * * and will surrender said yacht with all its gear, furniture and tackle, at the expiration of this contract, to the owner, or his agent, at Manning's basin, foot 26th street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description."

The qualifying words, therefore, found in our charter party, to "*surrender the yacht in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted,*" release us from any obligation to restore the yacht which was destroyed by shipwreck.

The Monroe General Term of the New York Supreme Court, in the case of *McIntosh vs. Lown*, 49 Barb., 550, in its opinion rendered by Mr. Justice WELLES, pointed out the effect of the qualifying words to which we have already alluded. The Court said:

> "Some authorities hold that where the covenant by the lessee is *to repair and leave the premises in the same state as he found or received them, or* language to that effect, he is merely required to use his best endeavors to keep them in the same tenantable repair, and is not bound, by such a covenant, to restore buildings destroyed, by fire or otherwise, during the term, without his fault. This is in consequence of a construction given to the covenant, that the lessee is *so* to repair or keep in repair the buildings, &c., *as* to leave the demised premises in the same state as he received them; and such I think is the settled law. But where the covenant is to repair or keep in repair generally, the buildings, &c., without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, &c., in case of the accidental destruction of the building, &c."
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> *Idem*, p. 555.

The case of *Ames vs. Belden* was an action to recover the value of a steamboat and a canal boat for not returning the same according to the condition of the charter party, which contained the following covenant:

> "And it is further understood that the said Belden shall be at all the expense of manning and furnishing said boat or boats for the time above stated, and return the same to the said Ames at the port of Port Ontario *in as good condition as they now are, with the exception of the ordinary use and wear;* and if the said Belden shall at any time refuse to fulfill on his part, the said Ames shall have the right to take possession of the said boats wherever the same be found."
>
> *Ames vs. Belden*, 17 Barbour, pp. 513, 514.

And Mr. Justice HUBBARD, in rendering the opinion of the Oswego General Term, said:

> "It is contended on the part of the plaintiff, and this is the gravamen of the action, that the defendant covenanted by the terms of this clause to return the boats *at all hazards* at the expiration of the lease, and that he is not excused from performance on the ground of the casualty set up in the answer. This construction I think untenable. In my judgment, the understanding expressed is, simply, what the law would have implied, and the language should, therefore, be construed as having been used with reference to the common-law obligation of a bailee in a bailment of this kind. At common law the duty of such a bailee is to exercise that degree of diligence and care in the preservation of the subject of the trust, which a prudent man ordinarily exercises in regard to his own property *(Story on Bail.*, Sec. 399*)*. His responsibility is limited to ordinary neglect; and hence, if the thing bailed is lost or injured by inevitable accident, without his fault, he is not liable *(Id.*, Sec. 408*)*."
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> 17 Barbour, pp. 514, 515.

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Judge WALLACE, in rendering the opinion of the Circuit Court of Appeals in this case, says:

> "In the present case the charterer not only explicitly undertook by the contract to return the yacht at the expiration of the term of hiring in as good condition as at the beginning, 'fair wear and tear from reasonable and proper use only excepted,' but also explicitly undertook to be responsible for any loss or damage to any part of the vessel, her equipment and furniture, and also to secure the owner in a specified sum against all losses and damages which might occur to her. It is impossible to construe such a contract as contemplating that the loss of the yacht by *vis major* or inevitable accident should discharge the charterer from further liability. The case is one where the promisor must fulfill the terms of his promise or respond in damages for a breach."
>
> *Opinion of Judge Wallace, Transcript*, pp. 281, 282.

The particular clauses of the charter party thus referred to by Judge WALLACE are the following:

> "That for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars ($75,000.00), and the said hirer shall procure security or guarantee to and for the owner in the sum of seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract.
>
> * * * * * *
>
> "The hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like."
>
> *Transcript*, p. 16.

We are unable to see any force in this reasoning of the learned Court. The whole contract must be read as one instrument, and the covenant to keep the

yacht in repair and surrender the yacht at the expiration of the contract expressly and explicitly limited by the qualifying words "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," is the controlling covenant as to redelivery or return of the vessel, and is conclusive as to the nature of the obligation.

The agreement of Lord to secure the owner in the sum of seventy-five thousand dollars, to secure any and all losses and damages which might occur, was merely an agreement to give a bond in which the penalty should be fixed at the sum of seventy-five thousand dollars, while the covenant that the hirer Lord should be responsible for any and all loss and damage to the hull, machinery, &c., imposed no greater liability upon the hirer than the other covenant to keep the yacht in repair and surrender the yacht at the expiration of the contract in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted.

The evidence shows that Chester S. Lord, who made and executed the charter-party or agreement in force at the time of the loss of the yacht (Exhibit B, *Transcript*, pp. 15, 16 and 71), was the managing editor of the "Sun"; he was not an officer, trustee, director or even a stockholder in The Sun Printing and Publishing Association, the corporation defendant. And the so-called charter-party and the agreement of suretyship or bond were executed by Lord without any authorization on the part of the corporation or without the sanction of any vote of its Board of Trustees or directors, but the corporation is held liable on the theory that, by the user of the vessel, it ratified the act of its agent Lord. But it cannot be reasonably supposed to have been in the contemplation of the Sun Printing and Publishing Association or of Lord to bind "The Sun" to restore the yacht in the event of her total destruction, by peril of the sea, the act of God or the *vis major*.

It is sought here to hold "The Sun," through the unfortunate act of its managing editor Lord, to a strict and rigid meaning of general words and to such a construction of the contract as would visit upon the defendant all the consequences of a breach. The construction contended for by the libellant would make the contract unreasonable, and would place one of the parties at the mercy of the other, and the law does not favor such construction.

> "Where there is uncertainty or doubt as to the meaning of words or phrases used in a contract, in seeking for the intent of the parties interested as evidenced by the words used, the fact that a construction contended for would make the contract unreasonable and place one of the parties at the mercy of the other may properly be taken into consideration (*Russell v. Allerton*, 108 N. Y., 288; *Wright v. Reusens*, 133 N. Y., 298, 305; *Jugla v. Trouttet*, 120 N. Y., 21, 28)."
>
> *Gillet vs. Bank of America*, November, 1899, 160 N. Y., pp. 557, 558.

In the case of *Russel vs. Allerton*, 108 N. Y., 288, the charter party of the steamer "Bertha" provided that the cattle fittings were to be furnished by the plaintiffs, "charterers to approve the ventilation." The defendant required plaintiffs to furnish blowers for ventilation, and on plaintiffs' refusal to furnish them, refused to load the ship.

Judge PECKHAM, in rendering the opinion of the Court of Appeals, said:

> "We do not think that the effect of the words In the charter-party, 'charterers to approve the ventilation,' was to leave the subject of the ventilation of the ship to the absolute, unreasonable and wholly arbitrary decision of the charterer. The agreement was entered into in England in July, 1878, and performance was not to be entered upon, at the earliest, until the middle of the following March, and plaintiffs were to send their ship over to Philadelphia to load. It can scarcely

be regarded as credible that the owners of the vessel would place in the hands of the charterer the right to arbitrarily and without reason refuse to approve the ventilation of the ship.

"To give the words in question the meaning attached to them by the courts below is to place the plaintiffs in a matter purely of business wholly at the mercy of others with whom they were contracting. Could the plaintiffs have intended any such result, or could the defendant have expected such action on the part of the plaintiffs?

* * * * * *

"Parties have a right, of course, to make any contract they choose, so long as it is not illegal, but when the question arises as to what meaning is to be attached to words or phrases used in a contract, if there be any uncertainty or doubt concerning the same, considerations such as are above mentioned are entirely legitimate and should not be lost sight of while endeavoring to learn the true meaning of the parties as evidenced by the terms used."

Russell et al. vs. Allerton (February, 1888), 108 N. Y., pages 292, 293.

This case of *Russell vs. Allerton* was cited with approval by the Court of Appeals in the case of *Wright vs. Revsens*, 133 N. Y., 298 (May, 1892), when that Court, in its opinion rendered by Judge O'BRIEN, said:

"To assent to the construction contended for by the defendant would make the contract unreasonable and place the plaintiff entirely at the mercy of the defendant and the architect, and such a construction should be avoided when the general scope of the instrument and the terms used by the parties fairly permit a more just and reasonable interpretation *(Russell v. Allerton*, 108 N. Y. 288*)*."

133 N. Y., pp. 304, 305.

The same view was taken by the Court of Appeals as recently as January, 1901, in the case of the *Buffalo & Lancaster Land Company* against the *Bellevue Land and Improvement Company*, 165 N. Y. 247, where the learned Court said:

"The whole contract and its purpose and object must be brought into view and the language employed by the parties understood in a reasonable way. Neither party intended to be bound to do things that were impossible. The construction for which the learned counsel for the plaintiff contends would be unreasonable, and would place the defendant at the mercy of the elements, since it is well known that the operation of railroads is frequently interrupted by storms such as are mentioned in the findings in this case.

"The accepted canons of interpretation are opposed to a construction that would visit upon the defendant all the consequences of a breach, as specified in the agreement (*Del., L. & W. R. R. Co. v. Bowns*, 58 N. Y., 573; *Russell v. Allerton*, 108 N. Y., 288; *O'Brien v. Miller*, 168 U. S., 287; *Gillet v. Bank of America*, 160 N. Y., 549; *Horgan v. Mayor, etc.*, 160 N. Y., 516)."

Idem, 165 N. Y., p. 254.

"In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion and apparent object of the parties, to determine the meaning and intent of the language employed. Indeed, the great object, and practically the only foundation of rules for the construction of contracts is to arrive at the intention of the parties. This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties and the objects which they had in view, and when the intent is thus ascertained, it is to be effectuated unless forbidden by law. 'Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish' (*Robertson v. O. E. Co.*, 146 N. Y., 20, 24; *Halpin v. Insurance Co. of N. A.*, 120 N. Y., 73; *Smith v. Kerr*, 108 N. Y., 31, 37; *Coleman v. Beach*, 97 N. Y., 545, 553; *Parshall v. Eggert*, 54 N. Y., 18, 23; *French v. Carhart*, 1 N. Y., 102; *Colwell v. Lawrence*, 38 N.

Y., 74; *Cotheal v. Talmage*, 9 N. Y., 554; *Booth v. Cleveland Mill Co.*, 74 N. Y., 15; Beach on Modern Law of Contracts, Sec. 702; Bishop on Contracts, Sec. 380; Lawson's Rights, Remedies and Practice, Sec. 2316)"

Gillet vs. Bank of America, 160 N. Y., pp. 555, 556.

It cannot reasonably be supposed to have been in the contemplation of the contracting party, Lord, when the contract was made to bind his employer by a foolish and preposterous agreement to the payment of an enormous sum, in the event of the loss of an old second-hand vessel.

This Court in the case of the *Chicago, Milwaukee & St. Paul Railway Co. vs. Hoyt* (October Term, 1892), reported in 149 U. S., 1, said:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Idem, pp. 14, 15.

It is respectfully submitted that the Circuit Court of Appeals erred in segregating certain provisions from the entire instrument or so-called charter party, and thus frustrating the consideration of the whole agreement. Such theory of construction was held erroneous by this Court in the case of *O'Brien vs. Miller* (Octo-

ber Term, 1897), where Mr. Justice WHITE, in rendering the opinion of the Court, said:

"There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that 'if during said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void.' But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them (*Boardman v. Reed*, 6 Pet., 328; *Canal Co. v. Hill*, 15 Wall., 94).

"This general rule of construction should especially guide a court of admiralty in interpreting a contract of bottomry and respondentia.

"In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity (per

STORY, J., in *The Virgin*, 8 Pet., 538, 550); and the same learned justice, in the case of *Pope v. Nickerson*, 3 Story, 486, said: 'A court of admiralty in cases within its civil jurisdiction acts as a court of equity, and construes instruments, as a court of equity does, with a large and liberal indulgence."

O'Brien vs. Miller, 168 U. S., pp. 296, 297, 298.

In the case of "The Virgin" (January Term, 1834) 8 Peters, 538, the second headnote reads:

"It is no objection to a bottomry bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry bond may be good in part and bad in part; and it will be upheld by courts of admiralty, as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity."

And in rendering the opinion of the Court, Mr. Justice STORY, said:

"It is true, that the bottomry bond was taken for a larger amount; but that furnishes no ground of objection to the bond, except for the surplus; for a bottomry bond may be good in part, and bad in part; and it will be upheld by courts of admiralty, as a lien to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. There are many authorities to this effect; but it is only necessary to cite the cases of "The Augusta," 1 Dodson's R., 283, "The Tartar" and "The Nelson," 1 Hag. Adm. R., 169, 176."

Idem, p. 550.

Another principle of law in reference to the construction of constracts is that where there is any uncertainty or ambiguity as to the meaning of an agreement, it should be resolved in favor of the party who did not prepare the contract. It appears from the testimony of the libellant, William L. Moore, that the so-called charter-party, dated May 14th, 1898, was received by Moore a few days thereafter from his agent, Thomas Manning *(Transcript, p. 213*, marginal page 280*)*. Moore, the libellant, swore that Thomas Manning was his agent and was authorized by him to sign the papers *(Transcript p. 24*, marginal p. 37*)*. Manning was a yacht broker *(Transcript, p. 98*, marginal page 129*)*.

It is evident from the language of the charter party that it was drawn by Manning as the agent of the libellant Moore, and it, therefore, should be construed in case of doubt against the libellant, because he is responsible for the language used. In the case of *Gillet vs. The Bank of America* the New York Court of Appeals said:

> "Such unusual and almost unlimited power over the property of another is not to be implied or inferred from doubtful or uncertain language.
>
> "If there is any uncertainty or ambiguity as to the meaning of the agreement, it should be resolved in favor of the plaintiff, as it was the defendant who prepared this contract. If there is any doubt as to the meaning of the terms employed, the defendant is responsible for it, as the language is wholly its own. We think the principle controlling as to the construction of insurance policies and other similar instruments is applicable to this agreement, and that it should be liberally construed in favor of the plaintiff. If the language can, without violence, be interpreted to include only such liabilities to the defendant as resulted from transactions between the plaintiff's assignors as customers and the defendant as a bank, or their liabilities which came into its hands in the ordinary course of its banking business, it

should be adopted (*Mynard v. Syracuse, Bing. & N. Y. R. R. Co.*, 71 N. Y., 180; *Nicholas v. N. Y. C. & H. R. R. R. Co.*, 89 N. Y., 370; *Rickerson v. Hartford F. Ins. Co.*, 149 N. Y., 307, 313).

"The reason of the rule that the language of an instrument is to be construed against the person who proposes it rather than against the person who is invited to accept it, is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to the strict interpretation of them rather than he who only accepts them."

Idem, pp. 554, 555.

The loss of the yacht was caused by no want of skill in navigation, by no want of competency in the Master, and from no fault on the part of the vessel.

Captain Atkinson, who was the captain of the vessel at the time she was lost, testified: "My reasons for the stranding of the boat was, in the first place, an unknown current; in the second place, the non-lighting of the lights at Matternilis Point Reef" (*Transcript*, p. 101, marginal p. 133).

* * * "The causes in my opinion were first, an unknown current; second, the non-lighting of the lighthouse; third, an imperfect chart of the coast. * * * My chart gave no instructions as to currents at all" (*Transcript*, p. 101, Marg. p. 134).

"I had been informed that the lights on the north side of Cuba had been all re-lit and were burning" (*Transcript*, p. 102, Marg. p. 134).

He further testified that "stranding would have been avoided" if the light had been burning (*Transcript*, p. 102, Marg. p. 135).

And he said: "From my knowledge and the knowledge I gained while I was there, this Matternilis Point light and the light that was called the Eastern Point light were the only two lights which were not exhibited on that night. The lamps had been destroyed by the Spaniards, and our Government, not knowing this, had not furnished lights. * * * On the night in

question I know of my own knowledge that the lamps had been destroyed by the Spanish soldiers, and had not been replaced and relighted. * * * I was shown by the police the lamps that had been destroyed."

Transcript, p. 103 (marg. page 136).

Mr. Wilbur J. Chamberlin, who was on the yacht at the time of her loss, said that the chart on board the "Kanapaha" was the last chart published before the boat left here. He said: "We got an entire new set of charts for West Indian waters. It was the last United States chart" published prior to the sailing of the boat from this port.

Transcript, page 167; Marg., page 220.

He also testified that "There ought to have been two lights. The lighthouses were there, but the lights were not. The lights were not burning that night. I was on deck. I had just left the bridge. The lighthouses were in plain sight from the vessel the next day."

Transcript, page 166, Marg., page 218.

Mr. Chamberlin further testified that the reef upon which the vessel struck was not shown on the chart which was on the vessel at the time of the accident.

Transcript, page 167; Marg., page 219.

III.

THE RESPONDENT, NOT HAVING AUTHORIZED THE EXECUTION OF THE ALLEGED CHARTER-PARTY AND AGREEMENT OF SURETYSHIP, AND NOT HAVING RATIFIED THE ALLEGED CHARTER-PARTY AND AGREEMENT OF SURETYSHIP, EXCEPT AS TO THE USER OF THE YACHT, IS NOT BOUND AS TO THEIR SPECIAL PROVISIONS BEYOND THE ORDINARY LIABILITY OF A BAILEE.

The alleged charter-party and agreement of suretyship were executed by Chester S. Lord, managing editor of the morning newspaper called "The Sun," one of the two newspapers published by the defendant corporation. He was not an officer of the respondent, not a director or trustee thereof, or even a stockholder. The alleged charter-party was in his name as the hirer, and the respondent is not referred to in any way therein except in the words "For Sun Printing and Publishing Association," following the signature. The so-called agreement of suretyship is signed in the same way, although it purports in the body of the document to be an agreement made by "The Sun Printing and Publishing Company" (*Transcript*, pp. 16, 17; marg. pp. 25, 26). The evidence in the case shows an entire absence of either a general or a special authority on the part of Mr. Lord to bind The Sun Association by either of these specific contracts, nor was there anything in his occupation which would lead to an inference that he was clothed with such authority. The evidence also shows that the Board of Trustees never took any action upon these agreements of Mr. Lord, and that, as individuals, they were not aware of their contents. There could, of course, be no ratification without knowledge.

The Sun Printing and Publishing Association never authorized Mr. Lord to make the charter party or the

agreement of the suretyship, and he had no original or precedent authority to execute the contracts.

The very inartificial form of the charter party made on May 14th, 1898, and in force at the time of the loss of the yacht, shows that it was not a corporate act or an act authorized by the respondent corporation.

The Charter Party begins:

> "MEMORANDUM OF AGREEMENT made and entered into this 14th day of May, 1898, by and between William L. Moore, of the City of New York, by Thomas Manning, his Agent, party of the first part, hereinafter called the Owner, and Chester S. Lord, of the City of New York, party of the second part, hereinafter called the Hirer."
>
> *Transcript*, p. 15, marginal page 23.

And it should be noted that while it is here expressly stated that Thomas Manning is the agent of the owner, William L. Moore, it is not stated that Chester S. Lord is the agent of any party, but the paper on its face assumes to be made between Moore, through his agent Manning, and Chester S. Lord, individually. We read through the whole of the instrument without finding any words or any language to indicate that the ageerment or contract is made or purports to be made for the respondent, and it is sought to hold the respondent merely by virtue of the words "For Sun Printing and Publishing Association" following the signature of Chester S. Lord.

The so-called agreement of suretyship of May 14th, 1898, added nothing to the charter party of that date.

The charter was not acknowledged, but the execution of the agreement of suretyship was acknowledged by Mr. Lord as managing editor of The Sun Printing and Publishing Company (a palpable misnomer). The certificate of the notary states "before me personally appeared Chester S. Lord, to me known and known to me to be the managing editor of The Sun Printing

and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said company as its act and deed" (*Transcript*, p. 17, marginal page 26).

Both papers bear evidence on their faces of having been hastily executed by Mr. Lord without any due consideration of the terms thereof. Mr. Lord had no more right to make and execute these papers than he would have had to convey the real estate of the respondent corporation or the premises then and now occupied for the printing of the respondent's newspapers.

Mr. MACDANIEL, the cashier of the respondent corporation and its recording secretary, testified:

> "Q. What is the practice of the corporation of signing written instruments in behalf of the corporation? A. A resolution is passed authorizing the president or other proper officer to sign and the secretary to affix the official seal to the instrument."
>
> *Transcript*, p. 137, marginal page 181.

Mr. Macdaniel produced the minutes of the Board of Trustees of The Sun Printing and Publishing Association, and he was examined *in extenso* as to what was shown in these minutes (*Transcript, pp. 137 to 142; marginal pages 180 to 188*).

The minutes of the meeting of April 24th, 1898, were admitted in evidence.

Respondent's Exhibit B.—April 24, 1899.

> 170 Nassau Street,
> NEW YORK, April 26, 1898.
>
> The regular meeting of the Board of Trustees was held this day at 1 P. M.
>
> Present—Paul Dana, Thos. Hitchcock and Franklin Bartlett.
>
> Minutes of meeting held March 22d, 1898, were read and approved.

The Examining Committee reported the books correct to the 23d inst., and recommended a dividend of five per cent. on the capital stock, payable June 1st, 1898, which on motion was so declared.

Mr. Hitchcock was appointed to investigate and report on the subject of the investment of surplus earnings.

Application was received from the Third Avenue R. R. Co. for permission to change their motive power, and on motion of Mr. Hitchcock it was

Resolved, That said application be hereby granted, and the president be authorized to sign same and affix the corporate seal of this association to said instrument.

On motion the meeting adjourned.

Attest:

L. O. MACDANIEL,

Recording Secretary.

Transcript, p. 262, marginal page 348.

It appeared affirmatively that the Board of Trustees of the respondent corporation never authorized the execution of the charter parties or the agreement of suretyship. But the respondent, in its evidence, went a step further, and showed affirmatively that the secretary of the corporation, Mr. Thomas Hitchcock, whose duty it would have been to sign any corporate paper or any paper to be made or executed by the corporation, explicitly refused to execute these very papers.

Transcript, pp. 155, 156; Marginal pages 204, 205.

Mr. Hitchcolk also testified;

Q. Throughout the year 1898 you were one of the trustees of The Sun Printing and Publishing Association? A. I was.

Q. And I believe you attended every meeting of such Board of Trustees? A. I did.

Q. At any meeting of the said Board of Trustees or of the directors of the Sun Printing and Publishing Association was any resolution or motion passed authorizing the execution of any

charter party of this yacht "Kanapaha," or of any agreement of suretyship in reference thereto?

Objected to on the ground that the question has been already answered, and on the further ground that it is incompetent, and that any action of the Board is not binding on the libellant.

Objection overruled. Libellant excepts.

A. There never was.

BY THE COURT:

Q. Was the subject ever brought up in discussion at any meeting of the Board.

Libellant excepts.

A. It never was.

Transcript, pages 156, 157; marginal pages 206, 207,

The trustees or directors of The Sun Printing and Publishing Association, at the time of the execution of these papers in May, 1898, were Paul Dana (the president), Thomas Hitchcock (the secretary), William M. Laffan and Franklin Bartlett *(Transcript*, p. 138, marginal p. 183*)*, and at the time of the trial of this action Mr. Laffan had sailed for Europe *(Transcript*, p. 22, marginal p. 302*)*.

We have just examined the testimony of Mr. Hitchcock. Mr. Paul Dana swears that he was not consulted, and that he did not tell Mr. Lord, at any time, that he could make or execute any charter party for the respondent corporation—The Sun Printing and Publishing Association—and that he did not give any instructions to Mr. Lord on the subject of charter parties or bonds *(Transcript*, p. 229, marg. p. 302*)*.

Mr. Bartlett testified as follows:

"I am one of the trustees for The Sun Printing and Publishing Association, the respondent corporation, and was such trustee for the year 1898. I never knew anything about these alleged charter parties or alleged agreements of suretyship, and never heard anything about them until after the wreck of the vessel. The papers were never sub-

mitted to me, although contracts in writing on behalf of the corporation have often been submitted to me for years past."

Transcript, p. 248, marginal p. 325.

Judge BROWN, in his opinion, in speaking of the charters, says:

"Many circumstances, however, are brought out in the evidence in regard to the conduct of the parties during the charter period, as well as before, from which no doubt is left in my mind that these contracts must be deemed legally to be the contracts of 'The Sun,' the defendant; that Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts; that he intended to bind the defendant and not himself, and that the trustees and managing officers of the defendant had such general knowledge of his acts in hiring the yacht, and such perfect means of knowledge of all the particulars, had they desired to know them, as to make their acts in using the yacht under the charters, as they did, a ratification of Mr. Lord's action, and to bind them for the performance of his agreements made in their behalf."

Transcript, pp. 264, 265; marginal pages 352, 353.

It will be seen that Judge BROWN held that "Mr. Lord had such general authority as was sufficient to enable him to enter into these contracts," but we submit that there is no evidence upon which such authority can be predicated.

The principles which are opposed to this decision are so familiar that it is hardly necessary to cite authorities for them.

In every case where it has been held that the person exercising the power had general authority so to do, the power has been exercised by the president, the

secretary or the treasurer or by some officer of the corporation, or by the Board of Directors or by the cashier of a bank or the general manager of a business corporation, or by an authorized committee. There has been no case which has come within our notice where it has been held that an editor, not an officer or not a director of a corporation, could bind the corporation by the execution of a written contract.

> "Although judicial opinion on the question is not unanimous, the prevailing American doctrine, founded upon considerations of the most obvious sense, justice, and business convenience, is that certain powers, usually exercised by certain officers of business corporations, are presumed to exist in them, and that the public, in dealing with such corporations, have the right to act upon this presumption until the contrary fact is disclosed. Such powers are said to exist in particular officers by implication of law. The officers to whom this implication extends are those officers whose offices exist in most private corporations organized for pecuniary gain, such as the president, the secretary; in banking corporations the cashier; and in most mining, manufacturing, and trading corporations, the general manager."
>
> *Thompson on Corporations*, Vol. 4, Section 4677.

The Court of Appeals in the case of *Mechanics' Bank vs. New York and New Haven R. R. Co.*, 13 N. Y., p. 632, said:

> "Underlying the whole subject *there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent.* This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to

the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But, in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other."

It does not matter what authority Mr. Lord supposed he possessed, nor does it matter what authority he asserted that he possessed, for an agent cannot create for himself an authority simply by asserting that he has it.

"It is a general principle in the law of agency, founded upon the most obvious considerations of sense and justice, that an agent cannot create for himself an authority, simply by asserting that he has it. The contrary rule would place it in the power of any person to make himself the agent of another, simply by asserting that he has been so appointed by that other. This principle applies to the case of corporations, which, from their very nature, can only act through agents. As such agents neither appoint themselves nor prescribe the limits of their own authority, the fact that a person not being the officer or agent of a corporation claims to be such, or being such officer or agent claims to possess power which has not been conferred upon him, will not, subject to the exceptions elsewhere noted, bind the corporation." * * *

Thompson on Corporations, Vol. 4, Section 4880.

"But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts:

"1. That the act was done in the exercise; and,

"2. Within the limits of the powers delegated."
Mechanics' Bank of Alexandria vs. The Bank of Columbia, 5 Wheaton, 337.

"One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority."
Alexander et al. vs. Cauldwell et al., 83 N. Y., 480.

"It would seem to be the general rule that no acts of an agent can be resorted to to establish a power not included within the terms of his commission, except those which are brought to the knowledge of his principals and are approved or acquiesced in by them."
Bickford vs. Menier et al., 107 N. Y., 493.

"While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent.

"That is, he is bound equally by the authority he actually gives, and by that which, by his acts, he appears to give.

"For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. *The fundamental proposition is that one man can be bound only by the authorized acts of another.* He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."
Edwards et al. vs. Dooley et al. (June, 1890), 120 N. Y., p. 551.

The form of the instruments is enough to show to any one with the slightest experience in such matters that they were not done in pursuance of a formal exercise of a corporate authority. They were alone sufficient to put the other party upon notice.

> "The principle under consideration does not extend so far as to allow the authority of an agent to do a particular act to be proved by proof of his having previously done *a few similar isolated acts*, the doing of which has been tolerated by the corporation; but there must have been such a uniform course of conduct, in the face of those entitled to oppose, as would justify a man of reasonable prudence in concluding that there had been an antecedent authorization."
>
> 4 Thompson on Corporations, Sec. 4886.

The above proposition disposes of the suggestion that because a vessel had been hired by Lord on one or two previous occasions his authority to execute these instruments could have been inferred.

The essential point here is that Lord was not an officer of the corporation, and was not authorized in any way to bind it.

The respondent corporation never ratified the charter party or the agreement of suretyship executed by Mr. Lord.

No contract can be ratified by a corporation or by the officers or directors of a corporation, unless the provisions of the contract in question are known to the persons alleged to have ratified its terms. *Ratification, in other words, presumes knowledge, and, where the officers and directors are ignorant of the terms of a charter or contract, there can be no presumption that they have ratified or have intended to ratify the contract in issue.*

There can be no ratification of the acts of an agent without full knowledge on the part of his principal of all

the facts, and there must always be, moreover, an intention on the part of the principal to ratify the unauthorized act of the agent. In this case there was never any knowledge of the terms of the charter party, or even of its existence, by the corporation or its officers, until after the loss of the yacht. There was no knowledge of the penalty fixed in the bond or of the valuation of the boat at $75,000, for, as to this matter, and all the other terms of the charter party, the officers of the corporation were in absolute ignorance. There was, therefore, no intention on the part of the corporation, as principal, to ratify the terms of the charter party. It was held by the New York Court of Appeals in a recent case decided April, 1898 (*Merritt vs. Bissell*, 155 N. Y., 396), that—

> "A ratification of the unauthorized act of an agent, or of a stranger who claims to act as such, if it exists, must be found in the *intention* of the principal, either express or implied. If that intention cannot be shown, no ratification can be held to have been established. While it is the duty of a principal to disavow the unauthorized act of his agent within a reasonable time after it comes to his knowledge, or otherwise, in some cases, he makes the act his own, still, where one who has assumed to act as an agent for another has no authority to do so, but is a mere volunteer, a failure to disavow his acts will not amount to a ratification, unless under such circumstances as indicate an intention to do so" (pp. 400, 401).

This case in the Court of Appeals, *Merritt vs. Bissell*, is important, for the Court of Appeals there decided unanimously that a payment of $500 by the defendant to the plaintiffs on a contract did not constitute a ratification of the unauthorized contract, and the Court of Appeals reversed the unanimous judgment of the Appellate Division of the Third De-

partment (reported 84 Hun, 194), where the opinion had been rendered by MAYHAM, *P. J.*, and had been concurred in by Justices PUTNAM and HERRICK. And this case would seem to be a sufficient answer to the theory of the libellant that the payment of $10,000 for the user of the yacht was a ratification of the terms of the charter party.

It appears affirmatively in the case that, until the yacht was lost, the directors or trustees of the "Sun," either as a board or as individuals, knew nothing about the papers in issue or the terms of the charter party or agreement of suretyship, and, where there is absolute ignorance, there can be neither ratification nor acquiescence.

Judge Thompson says in his Book on Corporations at Section 5298:

> "It is a well-settled principle in the law of *agency* that a principal may ratify the unauthorized acts of his agent by *acquiescence*, or even by *silence*, after being *fully informed* of the facts and circumstances attending the unauthorized act" *(Story on Agency*, Sec. 255; *Wharton on Agency*, Sec. 86; *Courcier vs. Ritter*, 3 Wash. [U. S.], 549*)*.
>
> "*Ratification presumes the existence of knowledge of all the facts, and the Court could well say, from all that appeared, that he was not informed of the whole transaction, and consequently was in no position to ratify the wife's act*" (Kelly vs. Geer, 101 N. Y., 664).
>
> *Hommel vs. Meserole*, Second Department, May Term, 1897, 18 Appellate Div. (N. Y.), pp. 109, 110.

Even in the case of a contract made by a vice-President and general manager, the Court will not uphold it where there is an absence of authority and an absence of ratification. Such were the facts in the case of *Camacho vs. Hamilton Bank Note Co.*,

decided by the Appellate Division of the First Department (New York). Judge PATTERSON says:

> "But it is claimed by the plaintiff that in making his arrangement with Gray he was entitled to rely upon the apparent authority which he exercised as general manager, and upon the assumption that, as general manager, it was within his province to make this contract of employment. In the absence of proof of what exact authority belongs to a person descriptively styled a general manager, there is no rule by which a court can be guided in determining what the powers of such an official really are, except such as the evidence in a particular case may furnish of what the person has done in the general course of the business of the corporation. That the words 'general manager' would import that the person bearing that title is a general executive officer for all the ordinary business of the corporation is all that may properly be inferred, and this would justify, in connection with proof of acts done, a conclusion that all ordinary contracts made by such an official are authorized by the corporation. But no presumption of law can be indulged that, because a person acts as such a manager, he has the power to bind his principal *to contracts of an extraordinary nature* and of such a character as would involve the corporation *in enormous obligations and for long periods of time.* If a general manager, simply by virtue of his being charged with the ordinary conduct of the business, would have the right to bind his principal to a contract for service for three years, involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods and thus assume to himself a power which it can-

not be supposed was ever intended to be lodged in him?

* * * * * *

"But here we find that the evidence completely fails to establish the ratification. Certainly it is not to be deduced from any relation to the subject of Mr. Seebeck, who was president of the company at the time the letters were written. The plaintiff testifies that Mr. Seebeck was in and out and saw him rendering services. *The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing.* Nor is it a ratification of *any terms or conditions* of any employment which might have been made without due authority (Harrington v. Bank, I. T. & C., 361).

* * * * * *

"We are of opinion that, upon the whole case, the court was right in rejecting the evidence of the two letters alleged to have constituted the contract, and upon these grounds:

"First. That it is not to be inferred as matter of law that an agent who was a mere general manager of a business, by which term is meant one charged with the executive administration of the current business of the corporation, has the authority to bind his principal to any contract to run for a series of years, in the absence of proof of authority to make such a contract.

"Second. That, while such authority may be inferred from evidence of acts of the general manager, known to and acquiesced in by the officers of the corporation, yet the proof in this case is wanting in that element, and there is no proof of such acts as would have justified the plaintiff in relying upon an apparent authority to make the contract on which this action is brought.

"THIRD. *That there is no proof of ratification with knowledge of the contract.*

"The plaintiff having sued on the contract, and not upon a *quantum meruit*, and the effect of a judgment in his favor being to make a binding adjudication entitling him to recover for subsequent breaches, the judgment must be affirmed with costs."

VAN BRUNT, P. J., WILLIAMS, O'BRIEN and INGRAHAM, JJ., concurred.

Camacho vs. Hamilton Bank Note and Eng. Co., 2 Appellate Division Rep., N. Y., pp. 371-374.

In *United States against Beebe*, 180 U. S., 343, two actions brought by the United States in the Circuit Court for the Middle District of Alabama against Beebe and Henshaw, respectively, as sureties upon a bond of a Collector of Internal Revenue, had been compromised by the District Attorney. Several years later the United States brought a bill against the representatives of Beebe and Henshaw to recover the amount of the bond, or so much thereof as might be possible, out of certain property of the defendants. The bill set forth the previous compromise, the fact that judgment had been entered by consent, and that one of the defendants had actually paid the judgment to the United States. The case came up on demurrer, and the judgments of the Courts below sustaining the demurrers were reversed by this Court, it being held that the District Attorney had no authority to make the compromise, and that the act of the Government attorney was never ratified by reason of the fact that his principal had not full knowledge of the facts. The Court says:

"Where an agent has acted without authority, and it is claimed that the principal has thereafter ratified his act, such ratification can only be based

upon *a full knowledge of all the facts* upon which the unauthorized action was taken. This is as true in the case of the Government as in that of an individual. Knowledge is necessary in any event (citing Story on Agency). If there be want of it, *though such want arises from the neglect of the principal*, no ratification can be based upon any act of his. Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them."

United States against Beebe, 180 U. S., 343, at p. 354.

"It has been declared by this Court that 'no doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent, previously unauthorized, must, in order to bind the principal, be with full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud.'"

Bennecke vs. Insurance Co., 105 U. S., 355.
Owings vs. Hull, 9 Pet., 607.

In the Compania Bilbaina vs. Spanish-American, &c., Co., 146 U. S., 483, the Court said of a certain charter party:

"If there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses. * * * Nor did the delivery of the vessel to the respondent, and her acceptance by the latter, constitute a hiring of her under the charter party, as it would stand with the disputed clauses omitted."

The Court cited:

Eliason vs. Henshaw, 4 Wheaton, 225.
Insurance Company vs. Young's Administrator, 23 Wall., 85.
Tulley vs. County of Cook, 103 U. S., 155.
Minneapolis & St. L. Ry. Co. vs. Columbus Rolling Mill, 119 U. S., 149.

The fact that the corporation had the use of the yacht and paid for such use the sum of $10,000, and that its officers did one or two minor acts in reference to the vessel, indicates a ratification only so far as it regards the mere hiring at a specific rate. The absence of all knowledge or ratification of the particular terms and conditions of these extraordinary agreements absolved the corporation from liability under them. Its liability then becomes that of an ordinary case of bailment, where the bailee, having hired the article in question, is under a liability established by the law to redeliver the article, assuming that the article is still in existence; or, at most, if the article has been lost or destroyed through the negligence of the bailee, to answer in damages for the value of the article destroyed. It is not necessary that such a contract of hiring should be written, and the rights and duties that flow from it are matters of easy determination in law.

This ordinary contract, express or implied, for the user of the yacht may, perhaps, be said to have been ratified by the action of the association in keeping the vessel in service, paying her hire, &c. To suppose, however, that this includes such extraordinary provisions as are to be found specifically in the present alleged contract, as, for instance, that which affixes a value to the vessel at more than double their actual value; that which furnishes a guarantee or security of $75,000 to secure any and all losses and damages sustained by the owner by reason of such loss and damage and by reason of the breach of any of the terms and conditions of the contract; that which prescribes a demurrage of $500 a day for each and every day's detention after the alleged charter-party had expired—all these are stipulations quite outside the provisions of the ordinary contract of bailment, and the surety cannot be held responsible therefor in the absence of its knowledge, of any authority

on the part of the agent or of any knowledge or ratification on the part of the trustees. The existence of such unauthorized and unratified covenants vitiates the whole contract, and sets the parties back to the remedy of a *quantum valebat* under an ordinary implied contract of bailment, by which the stipulated rent would require to be paid and the property be redelivered at the expiration of the term.

Assuming that this is a case of such an implied contract, nothing could be predicated on the use of the yacht or payment of the charter money in respect of ratification except that the general terms of the implied contract of bailment were ratified; and, as Judge PATTERSON says, in the case last cited:

> "The mere fact that such services were rendered would not put the defendant upon inquiry as to the existence of a contract in writing. Nor is it a ratification of any terms or conditions of any employment which might have been made without due authority."

Point IV.

ASSUMING THAT THE RESPONDENT WAS LIABLE FOR THE LOSS OF THE YACHT, AND THAT ITS LIABILITY WAS TO BE COMPUTED ON THE BASIS OF THE SUM NAMED IN THE ALLEGED CHARTER PARTY, THE LIABILITY SHOULD STILL HAVE BEEN REDUCED BY THE SUM ALREADY PAID FOR THE HIRE OF THE YACHT—NAMELY, $10,000.

Such was the opinion of Judge BROWN in the trial Court, which was overruled by the Appellate Court.

The principle here involved is the simple and familiar one that where a surety has given a bond conditioned on the non-performance of certain agreements, and limiting his liability to a specific sum, any payment of the surety to the obligee on account of the

provisions of the agreement discharges to that extent his liability on the bond, and recovery must be limited to the extreme amount named in the bond, less the amount which has been already paid on account of this liability. In regard to this question three principles are to be noticed:

(1) The last clause of the contract of suretyship limits the total liability of "The Sun" to the sum of $75,000. It reads:

> "That our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars."

Reading the two instruments either together or separately, it is apparent that the meaning of this clause is that "The Sun," in fulfillment of this alleged charter party and agreement of suretyship should not be called upon to pay more than $75,000 as an outside limit.

(2) There is nowhere to be found in either instrument any specific promise to pay the sum of $75,000 in case of the loss or non-return of the vessel. In order to assume any such promise or covenant, it must be read bodily into the contract.

(3) The agreement of suretyship was to cover not only losses and damages which might occur to the boat or its belongings, but also the breach of any of the terms or conditions of the contract. The agreement of suretyship, therefore, secured not only numerous minor covenants of the charter party, but also the covenant to pay the rental of the yacht—namely, $10,000.

It follows that the payment of the rental of $10,000 is one of the payments covered by and included in the aggregate maximum liability of the "Sun;" that the covenant to pay the rental was executory, as the amount was paid after the signing of the agreements, and that, consequently, the "Sun" is entitled to have

a deduction to that extent from its total liability. The reasoning of Judge BROWN upon this question, which will be found in the transcript, page 266, marginal page 355, seems to us to be unanswerable, and the question of law involved is of such importance that it should be passed on by the highest authority.

Says Judge BROWN:

> "And the security required to be given by the terms of the charter and by the agreement of suretyship, which was, in fact, given and delivered at the same time the charter was signed, includes, therefore, the payment of the charter hire as well as the performance of the many other obligations contained in the charter. The charter hire of $10,000, as the evidence shows, was paid by 'The Sun's' check, which was dated on May 14th, the same date as the charter, but paid, according to the evidence, on May 16th. So much of its obligation of $17,000 has, therefore, been discharged by 'The Sun' and the express provision of the second instrument, called the agreement of suretyship, is that in no case shall the liability of 'The Sun' exceed the sum of $75,000."

In conclusion, then, the matters of law upon which it is contended by the petitioner that the Court erred, are as follows:

1. Where a sum is named in a contract of suretyship as liquidated damages, even though expressly so named, the Court will not regard it as anything more than a penalty, when the amount specified is disproportionate to the presumable or probable loss.

This principle, asserted with great clearness and emphasis by the Circuit Court of Appeals in the Fourth Circuit and affirmed on an argument for a rehearing, with the concurrence altogether of five Judges, including the Chief-Justice, asserted likewise repeatedly

by the Court of Appeals of the State of New York, is absolutely rejected and reversed by the decision in the case at bar, which not only disregarded the general principle, but, by affirming the judgment of the trial Court, rejected from consideration all evidence as to probable, presumable or actual loss.

2. The virtual adoption of the doctrine that, as a matter of law, the value of a specific yacht is of so uncertain a character as to be incapable of measurement by pecuniary standards.

3. The proposition that, assuming that, $75,000 was to be taken as the value of the yacht, the payment made by the respondent association of $10,000 should not be applied, as directed by the trial Court, as a payment *pro tanto* of its maximum liability of $75,000, and the decision that the sum of $75,000 must be paid in addition to the $10,000 called for by the covenants in the contract, making a total payment on account of this yacht of the sum of $85,000, with costs.

4. The setting up of the principle that where a contract in writing has been made by an unauthorized agent, without knowledge of his principals in respect to its details, and without ratification, the contracting party is as much bound by all the onerous provisions of such a contract as if he had entered into it with full knowledge or had expressly ratified it; when, in point of law, it is clear that the only ratification which the corporation had made was a ratification of the general contract of hiring, or the contract for the user of the yacht. In fact, the only thing which could be presumed to have been ratified by the respondent corporation was the implied contract of bailment.

5. The attempt to reverse Young vs. Leary and other high authorities by holding that the destruction of the thing to be redelivered did not absolve the bailee,

unless the destruction was in consequence of its own negligence.

All of these points are fully covered by the assignments of errors.

Point V.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

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